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FOREWORD

WHEN the American Arbitration Association was founded, in 1926, it dedicated itself to the supreme task of advancing a science of arbitration. Although the theory and principles of arbitration had long been fixed, research and experimentation and the publication of their findings, so necessary to the establishment of any science, had been lacking.

In pursuance of this task, the Association followed two courses: The organization, in systematic form, of the practice of arbitration which is set forth in its *Code of Arbitration Practice and Procedure* and other publications, an account of which appears in Mr. Odlum's article in this issue; and the systematic formulation of the knowledge of arbitration into a distinctive literature of its own.

THE ARBITRATION JOURNAL is the logical next step in the organization of this knowledge. It undertakes to "hive off" a sphere of knowledge, hitherto undifferentiated from the field of law in which arbitration has been submerged and from the atmosphere of courts which has long penetrated its practice. It seeks to obtain a new focus and to paint new pictures of a somewhat hitherto drab existence and to bring to bear upon the whole subject a closer observation and a more discriminating judgment.

In a specialized publication, such as this, it is possible to present, in attractive detail and in systematic form, various experiments and to incorporate the results of research and of special studies. It is possible to encourage exploration of the past and to assemble current information and to provide for its exchange in all countries. There is afforded the opportunity to follow not only the adventure of ideas but to present some of the adventurers. In this way human knowledge will be extended and the pattern of the science will begin to take form, lifting arbitration from its narrow sphere of law, from its attributes of a panacea, and making it the servant of man's welfare and progress.

Let us be more specific: By opening the archives of history, the accumulated general knowledge of the centuries becomes common knowledge. By recording current history, the simul-

taneous action of men and nations takes on a coherence and a prominence that gives to the subject the authoritative voice to which it has long been entitled. By maximizing knowledge, that is, by correlating it in one place, its significance to the welfare and progress of man assumes a new and more intelligible importance. By analyzing and discussing the subject, as a whole and the relation of its parts, chaotic thinking is reduced to order, ignorance is dispelled and prejudices allayed.

While a light structure of legal procedure will always be necessary to the effectiveness of arbitration, this should not obscure the concept that arbitration has a life of its own, outside of the juridical system, that is possible of scientific organization. Important as it is for arbitration to offer security against the little economic wars called litigation, it is of even more profound importance that it function: to maintain commercial peace and to raise constantly the level of goodwill; to afford commerce and industry a means of self-government; and to provide society with a lubricant for its often creaking and rusty machinery for controlling competition and for administering justice.

In the organization of its material this publication aims to present in each quarterly issue: one or more leading articles on American and international arbitration; a symposium describing the use of arbitration in some one significant field; and an inter-American section which will be reprinted in Spanish for distribution to Latin-American Republics. Where studies of special subjects are undertaken, a brief article will be presented in THE JOURNAL and the complete study may appear as a supplement.

In this systematic organization of knowledge, THE ARBITRATION JOURNAL will have the cooperation of distinguished foreign collaborators and institutions; of the leaders in the Pan American program for peace; and of leading Americans. If, through their combined thought and experiment, there shall one day develop a science of arbitration, which will take its place side by side with the science of jurisprudence, in the systematic advancement of goodwill, in the amicable administration of justice, in the maintenance of commercial peace, and in the amelioration of the conditions under which men work and live, the American Arbitration Association believes THE ARBITRATION JOURNAL will have had a significant part in this achievement.

LUCIUS R. EASTMAN,
President.

SPECIAL COMMUNICATIONS

LONDON. A full history of Arbitration has never been written. The thought, practice and tendency of different countries are not much known nor considered. Co-ordination scarcely exists.

All friends of Arbitration and peaceful settlement of disputes and difficulties will welcome the proposed effort of the American Arbitration Association to establish a quarterly ARBITRATION JOURNAL, and specially will it be welcome to the Institute of Arbitrators in Great Britain, a body which has already achieved fruitful results by its support of the improvement of the Law of Arbitration in this country.—ASKWITH, President, Institute of Arbitrators.

PARIS. During the 15 years of its work for the establishment of closer relations between the nations, the International Chamber of Commerce has never ceased to consider international commercial arbitration as a factor of paramount importance. The provision of an extra-judicial method for the settlement of business disputes, which leaves parties free to undertake further transactions, promotes trade and, accordingly, contributes to the consolidation of peace. The International Chamber of Commerce, therefore, can but express its satisfaction as regards the auspicious initiative of the American Arbitration Association. The creation of THE ARBITRATION JOURNAL, by furthering knowledge of arbitration, both theoretical and practical, will promote increased recourse to this procedure, the common aim of the International Chamber of Commerce and the American Arbitration Association. It cannot be repeated too often that, in this field, there is no such thing as competition; all systems are closely inter-linked; the success of one is the success of all, in so far as it strengthens confidence in arbitration in general. On the other hand, the unenforcement of any award strikes at the very root of arbitration. This is why the Court of Arbitration of the International Chamber of Commerce, which has already settled disputes between parties of 57 different nationalities and involving millions, wishes the American Arbitration Association every success in the educational work it is about to set on foot.

Notwithstanding the difficulties of the moment, it is more than ever necessary to take an optimistic view and to keep faith in progress. Can there be a better proof of such faith than the

promotion—at a moment when world trade is, as we hope, tending towards recovery—of recourse to suitable methods for the speedy and not too costly settlement of business disputes?

By inserting an arbitration clause in his will, that most illustrious of American citizens, George Washington, bequeathed to his country and the whole world a most cogent argument in favor of arbitration. The American Arbitration Association felt that it was called upon to encourage its countrymen to follow this historical example; this powerful organization has not failed to accomplish its task, for it has succeeded in making arbitration a common usage in the United States.

Let us hope that, from the point of view of international relations, a sphere in which the United States pursue a new and liberal policy, they may one day adhere to the international conventions governing the status of arbitration, namely, the Geneva Protocol of 1923 relating to arbitration clauses and the Geneva Convention of 1927 for the enforcement of foreign arbitral awards. The day on which this becomes an accomplished fact will see the foundation of a great international community, within whose frontiers commercial arbitration will at length be called to uniform development, protected by the guarantees afforded by these diplomatic instruments.

The results which have already been obtained by the American Arbitration Association hold forth definite promise for the success of its new undertaking. May our best hopes and wishes attend the birth of the "ARBITRATION JOURNAL"!—NICOLAS POLITIS, President, The Court of Arbitration, of the International Chamber of Commerce.

LONDON. Special experience in arbitration business is not needed to convince any reasonably well instructed lawyer that the importance of such business has increased greatly in recent memory and is still increasing. The World War of 1914-1918 gave a check, among many other activities, both to commercial enterprise and to the improvement of communications; but there has been considerable recovery and I understand that in London within the last few years the volume of references to arbitration has notably increased. Cases involving questions of conflict of laws, with their attendant difficulties, are becoming both absolutely and relatively more numerous. At the same time there is reason to think that the provisions for arbitration in existing commercial contracts are too often imperfect or out of date, such

as the old-fashioned form of reference to two arbitrators and an umpire. The establishment of a journal, for the historical and comparative study of arbitration, and the discussion of improvements in procedure, should be welcome, not only to those who are specially concerned with mercantile law, but to the profession at large.—FREDERICK POLLOCK.

LONDON. The spirit behind arbitration is one which appeals strongly to the English-speaking peoples: it is a spirit of " sweet reasonableness ".

For arbitration to take deep root in a country, it is necessary that certain things should be present.

Firstly, there must be a willingness on the part of the individual to conceive that perhaps he may be wrong: that however clearly he sees the justice of his own side of the question, he is prepared to admit that there may be another side of the matter which his natural prejudice in favor of himself prevents him from seeing.

Secondly, a confidence on the part of the disputants in the integrity of their fellow citizens, and in their ability to reach a fair decision without fear or favor and,

Thirdly, a willingness on the part of the disputants to accept an adverse decision in a sportsmanlike spirit, without question, and without rancour.

In this connection, it is satisfactory to be able to record that in all the many thousands of cases which have come before the London Court of Arbitration during the last 30 years, there have only been two instances of appeal from the decision of arbitrators appointed by the London Court of Arbitration, to the Courts of Law.

The London Court of Arbitration is managed by the London Chamber of Commerce, and its membership consists of representatives of the London Chamber of Commerce and of the Corporation of London, in equal numbers.

There has, perhaps, been no time in history when the world was so urgently in need of the qualities of character which alone make arbitration a feasible method of settling disputes. It is, therefore, with much pleasure, that I have learned of your intention to publish a journal devoted to arbitration and therefore necessarily to the promotion of those qualities on which its success depends.—STEPHEN DEMETRIADI, President, The London Chamber of Commerce.

THE NATIONAL SYSTEM OF THE AMERICAN ARBITRATION ASSOCIATION[1]

BY

FLOYD B. ODLUM

Member of the American Bar Association; President of the Atlas Corporation

IN THAT incomparable *Treatise on the Law of Arbitration in Scotland*, written so many years ago by that distinguished scholar, John Montgomerie Bell, Esq., there is disclosed a brilliant record of achievement in the administration of justice through arbitration. The principles and practice, there set forth, and by later writers, have served as an inspiration and guide in building the national system, here described.

Unfortunately, the early development of arbitration in the United States followed the English tradition. Imported by the early colonists, arbitration was accompanied by the English common law which did not authorize the legal enforcement of an agreement to arbitrate a future dispute and which law created many legal obstructions that made impossible easy access to arbitration.

When state arbitration laws were enacted, they incorporated many of the common law provisions or failed to repeal them, so at the present time there are a prevailing common law and 48 state statutes, all differing in essential particulars, a Federal Act and local regulations. These present the greatest possible confusion to parties seeking to escape litigation.

The advancement of arbitration depends primarily upon laws that make enforceable an agreement to arbitrate a future dispute; that enable the court to take certain legal steps to enforce an arbitration agreement, such as refusal to entertain an action until the arbitration has been held or to order it to proceed; that free the proceedings from legal technicalities, such as filing a submission with the court; and that remove certain handicaps such as the reference of questions of law arising during the proceeding to the court on the request of one party. Thirteen of the

[1] Reprinted through the courtesy of the *Scots Law Times*.

leading industrial states have adopted such legislation and a Federal Law, applicable to interstate transactions, is in effect.

Concurrent with the effort to obtain modern laws has been the establishment of a national administrative system designed to minimize or overcome the legal difficulties and to implement the statutes, thus providing the highest degree of security compatible with the prevailing law. Under this organized system, arbitration serves four purposes:

First, as a supplemental, quasi-judicial proceeding to the American juridical system, arbitration offers an alternative to litigation and security against it in the jurisdictions where arbitration provisions and awards are legally enforceable. Present security is afforded through agreements to arbitrate existing disputes and future security is afforded through arbitration clauses in contracts. Litigation in the United States is an ever-increasing burden to the taxpayer and a vast economic burden on the people. This burden is heaviest in the great trade centers where small claims make up the bulk of litigation. These comprise chiefly commercial disputes and tort cases where the claims are for damages for alleged injuries.[2]

Second, arbitration offers to business a method of self-regulation, particularly in the field of trade practices where alleged violations by a member of the trade are better adjudicated under this amicable method than in court. This takes the form of arbitration under well-established rules. This function appears, for example, in its use among insurance companies to adjust matters affecting their inter-relations.[3]

Third, under contracts between employers and employees, arbitration offers a method of adjudicating differences that might otherwise take the form of violence. American labor is turning from mediation to arbitration and is providing, in contracts of employment between employers and employees, for the formal arbitration of differences under established rules of procedure. It is not without interest to note that in New York State a recent law provides that injunctive relief will not be afforded by the courts until the parties have made an effort amicably to compose their differences.

[2] For more detailed statement, see p. 25.

[3] For description of this system, see p. 43.

Fourth, arbitration is an agency for public welfare, being used to raise the level of goodwill in the nation by eliminating grievances, by inspiring confidence in the good faith of contractual relations and by promoting commercial peace. It is estimated that in less than 50 per cent of the controversies, where arbitration is applicable, is the proceeding instituted; its mere availability serving as a means of ameliorating the conditions that threaten peace.

To facilitate these four functions the American Arbitration Association was organized in 1926. It is an educational, non-profit-making membership corporation, composed of business and professional men, including many members of the Bar. It is a private agency supported by membership dues and arbitration fees and it is administered by a Board of Directors and executive and other committees.

This article describes the national system built by the American Arbitration Association to make effective the foregoing purposes. It consists of two component parts: the facilities which constitute the American Arbitration Tribunals and the administration of proceedings in these Tribunals. Authority to establish these Tribunals is general and is contained in the Charter of the Association; authority to administer the proceedings is special and is conferred upon the Association by the parties whenever they agree to arbitrate under its Rules. The authority to establish Tribunals is stable and these facilities are permanent; the authority to administer proceedings is particular to each case and lapses with the settlement of that case.

Under its general authority to furnish arbitral facilities and to maintain Tribunals, the Association has prepared and promulgated standard rules of procedure, adapted to any jurisdiction and used by all arbitrators in these Tribunals throughout the United States; it has prepared a set of 28 forms for the guidance of a proceeding from its institution to the making of the award; it has devised a standard arbitration clause for use in any contract; it has established and maintains a national panel of arbitrators from which arbitrators, acting under its Rules, are chosen; it has prepared a guide for the instruction of these arbitrators in the duties of their office; it has assembled the arbitration statutes and decisions thereunder and practices of commercial groups and put these into reference books; it provides hearing-rooms and clerical services for any arbitration under its

Rules; and it pays the cost of the maintenance of these facilities. These facilities serve not only parties arbitrating under the Rules of the Association but offer a standard for many trade tribunals to which the Association acts in an advisory capacity.

Under its Rules, the services of the Association are delegated to an Arbitration Committee. It performs the duties assigned to it under the Rules and such other duties as the parties delegate to it by stipulation. This Committee receives the notice of the case; and, if no arbitration agreement exists, endeavors to obtain the consent of the other party. If the agreement exists, this Committee notifies the other party, sends out lists of arbitrators and names them when parties are in default; it sends out all notices, secures agreement upon the time and place of the hearing, makes all arrangements for the hearing and mails the award. It is the custodian of all documents. Parties, counsel and arbitrators are entirely relieved of all detail necessary to the institution of a proceeding.

Neither the Association nor its Arbitration Committee has any responsibility for the award. The arbitrators are the sole judges of the proceeding, as to its conduct under the Rules, the admission of evidence, and the hearing of witnesses; and the parties or their counsel are alone responsible for the presentation of the case, the witnesses they call and the evidence they submit. The clerk attends the hearings in the capacity of custodian of documents and to assist the arbitrators in any way they request.

The system has several outstanding characteristics that are peculiar to American conditions:

It is a national system, for there are seven thousand members of the National Panel and they are distributed over 1,600 communities. It is a highly centralized system, for applications for an arbitration are made through the central office which, in turn, makes the arrangements through the arbitrators in the locality where the hearing is to be held. This system is also general in character in that it is open to any parties in controversy, the only qualifications being that the parties shall have the power to enter into an arbitration agreement, that there is a bona fide controversy and that it is one that can be made the subject of a civil action.

It is a uniform system, for all arbitrations, wherever held in the United States, take place under the same rules under a practice set forth in the *Code of Arbitration Practice and Procedure,*

prepared by the Association. These Rules are subject only to such changes as the arbitration law of the jurisdiction requires and which the *Code* sets forth.

It is an elastic system and offers alternate schemes to parties desiring to arbitrate: They may arbitrate under a general plan and the Rules of the Association, with arbitrators chosen from its National Panel; or they may arbitrate under special plans under the Rules of other organizations, with arbitrators chosen from their panels but under the guidance of a representative of the Association.

It is a cooperative system, for the Association, the parties and their counsel, bar associations, business groups and the courts collaborate to make it competent for the administration of justice. The Association provides the facilities and administrative services; the parties and counsel voluntarily use it; the bar associations collaborate in improving arbitration law and in educating their members in the use of arbitration; the business groups urge their members to arbitrate; and the courts liberally construe the laws and correct any failures of the other cooperators to administer justice.

It is a legal system in that all proceedings are based on arbitration law. It is one in which compromise has but little place and in which adjudication, based on the evidence submitted, prevails. To this end every provision of the prevailing arbitration law is observed in order that the arbitration agreement and the award shall be legally binding and that the award may be entered as a judgment of the court. It should also be noted that it is an arbitral, not an umpirage, system, for all decisions are taken by a majority vote; and the appointment of partisans by the parties, which partisans in turn select an umpire, is discouraged under the Rules governing the appointment of arbitrators.

While the competence of this system depends on the administration of the proceedings, its integrity rests largely upon the personnel of the arbitrators, their qualifications and method of selection. The personnel of the National Panel is determined by the Association after careful inquiry into the reputation, character and judicial qualifications of the nominees. The qualifications are prescribed in a standard adopted by the Association which covers the foregoing and also the experience and standing of the nominee in his own calling. Integrity is assured under the Rules by the following unique method of selecting arbitrators.

When a demand for arbitration is made and no arbitrator has been appointed by the parties and no method is specified, the appointment proceeds under the Rules. With the notice to the parties to make such selection is enclosed an identical list of names taken from the National Panel, in accordance with the type of case or the expressed wish of the parties concerning the arbitrators' competence in a particular field. Instructions accompany these lists, advising the parties to cross off any names to which they object and to mark the remaining names in the order of preference, and to return the list within a period of seven days. From the names remaining mutually on the returned lists, the arbitrators are appointed by the Arbitration Committee, insofar as possible with their indicated order of preference. If an insufficient number of mutually chosen names remain on the lists, a second list is sent to the parties.

If the parties fail to return the lists within the time specified and no extension of time is requested, the Arbitration Committee makes the appointment from the lists sent out or from other names on the National Panel. Each arbitrator, thus appointed, is notified and receives a copy of the Rules, in which the qualifications for arbitrator are pointed out; namely, that he shall have no personal or financial relations with either party or any interest in the result of the arbitration which may prejudice the right of either party to a fair and impartial award; and that no person selected as arbitrator shall act as the champion of either party or advocate his cause, and that no compensation arranged between a party and his appointee shall be on this basis.

An arbitrator, upon receiving notice of his appointment, frequently advises the Arbitration Committee that he is unable to act by reason of some one of these requirements. If he fails to do so or a situation develops subsequently that creates a presumption of bias, the Rules provide that a party may challenge the arbitrator and, upon proof satisfactory to the Arbitration Committee, it may determine that the arbitrator has been selected in violation of the Rules and will invite the appointing power to recall the arbitrator. Upon its failure to do so within a prescribed time, the Arbitration Committee has the power to declare the office vacant and to fill the vacancy.

The services of these arbitrators are honorary; that is, they receive no compensation other than reimbursement for actual outlay. At the time of acceptance on the Panel they agree to serve

without compensation and they do so serve whenever they are called upon.[4] Under this system costs of arbitration are nominal and are strictly regulated. The Rules of Procedure prescribe the administrative fee which the parties pay, in equal amounts, based upon the amount of the claim and the number of hearings.

Hearings are formal, in that a regular procedure is prescribed for conducting them, for the presentation of the case, for the introduction of testimony, exhibits and other documents, for the examination of witnesses, for the taking of testimony and questioning of witnesses, for arguments by counsel and for the filing of briefs. All pertinent and material evidence must be received and all witnesses offered must be heard. The gathering of information and making inquiries or inspections outside of the hearing is carefully regulated.

Under this national system more than 8,000 matters have been referred to arbitration. Many of these cases have gone to awards; others have been settled by the parties during the negotiations for arbitration or during the proceeding; in other instances consent has been unobtainable and the arbitration could not proceed. No award rendered under this national system has been vacated by the Court and in but few instances has the award been challenged.

[4] For discussion on "Should Arbitrators Be Paid?", see p. 18.

INTERNATIONAL COMMERCIAL ARBITRATION

BY

ANDRÉ BOISSIER

Secretary General of the Court of Arbitration of the International Chamber of Commerce

AND

RENÉ ARNAUD

Technical Advisor to the Court

IN ALL countries of the world, private arbitral jurisdiction has established itself alongside the official courts; everywhere, business men prefer submitting their commercial disputes to their peers to mobilizing the slow and expensive machinery of justice.

This tendency, if justified in the case of disputes between business men of one and the same country, is still more so when the two parties are separated from one another by a frontier; for the question which here arises is no longer that of the preference of arbitral jurisdiction to an ordinary court. It is that of appointing a judge to an unfilled vacancy.

There is no such thing as an international commercial court, and the existence of such a body is, moreover, not particularly desirable, for it would, in all probability, present the same disadvantages as the ordinary courts, from the point of view of costs and time-limits. On the other hand, the jurisdiction of the existing national courts is bounded by the frontiers of their respective countries, and reference to these bodies cannot provide a satisfactory solution for the settlement of disputes of an international character. It is, therefore, natural that business men of different nationalities involved in a dispute should appoint an arbitrator to settle their differences.

What is equally natural is that the International Chamber of Commerce, an international federation of Chambers of Commerce and of business associations of various countries, should have established some 14 years ago an International Court of Arbitration for the settlement of disputes between business men of different countries, on the basis of an award rendered by an arbitrator—himself a business man or a jurist—of a nationality other than those of the parties to the dispute.

The following account of a case which was submitted to the Court of Arbitration of the International Chamber of Commerce may serve to illustrate the functioning of such arbitration.

During the summer of 1931, a Belgian firm in Brussels sold to a New York business man, subject to delivery in October, a fairly large quantity of silk in cocoons, imported from China at a price fixed by sale contract at £4,320 Sterling.

But in the interval between the establishment of the contract and the delivery of the goods, an unforeseen event took place; in September, 1931, Great Britain went off the gold standard and the pound sterling was devalued in terms of both Belgian francs and dollars.

The consequences entailed by this depreciation of the pound were only realized by the Belgian seller a fortnight later. But then his anxiety knew no bounds: what would he receive for the £4,320 when exchanging them at his bank for Belgian francs? In his national currency, 20 per cent to 30 per cent less than he had expected.

He accordingly cabled to his American buyer that he definitely reckoned with payment in devalued pounds of the equivalent of £4,320 gold, since the selection of the pound as contract currency had been due to the fact that the two parties—neither of whom was British—had regarded this currency as a gold currency and as having the stability of the metal itself.

The American buyer promptly replied that it was impossible to modify contracts by implication; that there had never been any question of a gold pound; that a pound was a pound and remained a pound, whatever its gold or foreign exchange value; that, moreover, deals in Chinese silk were invariably concluded in sterling or dollars; and that, consequently, he would consider his obligations under contract as having been fulfilled when he had paid the £4,320 *paper*.

The Belgian businessman retorted that he did not agree with the buyer. For several weeks, they exchanged correspondence, the tenor of which sharpened until the dispute reached an acute stage and the question of a decision arose.

The first idea of the Belgian merchant was to sue the American buyer before the Brussels court. He consulted a lawyer, who dissuaded him from this course by explaining to him that even if he obtained a judgment in his favor in Brussels, it would not be enforceable in America, or enforceable only subject to innumerable and costly formalities.

The alternative was to institute proceedings against the American in his own country and to sue him before the New York courts. The Belgian consulted an American lawyer, who frankly laid before him the difficulties and costs which this procedure would involve for a foreigner, the necessity of depositing security and the uncertainty of the issue. For the second time, the Belgian was discouraged.

But he was of a tenacious breed and continued to seek other means of gaining his point. At that moment, he regretted that he had omitted to insert in the contract an arbitration clause for eventual disputes. He nevertheless, proposed to his adversary to submit the dispute to the arbitration of the

International Chamber of Commerce. The American, certain of being within his rights and wishing to act fairly towards the seller, agreed.

The dispute was submitted to the Court of Arbitration of the International Chamber of Commerce and steps were taken to appoint an arbitrator. The arbitrator must be impartial. Therefore, the appointment of a Belgian or American arbitrator was excluded on principle, since an arbitrator of either nationality, according to his decision, might have been suspected of partiality in favor of his compatriot. The Court therefore selected an arbitrator in France, a country which entertained friendly relations with both Belgium and the United States and which was in no way interested in the dispute. The person chosen, on the proposal of the French National Committee, was a former official of the French financial administration and a director of an important business association in Paris, who thus combined with sound theoretical knowledge a day-to-day experience of business difficulties.

Each of the parties to the dispute had deposited two memoranda, setting forth their claims and replying to the arguments of the adversary. These four memoranda amply sufficed for the information of the arbitrator, who was not obliged to hear the parties—the latter having agreed to be judged on written evidence and having made a formal statement to this effect in the form of submission appointing the arbitrator and specifying his powers.

The arbitrator, after thoroughly examining the case, decided that the arguments of the buyer were receivable; he pointed out, in particular, that the bill had been made out by the Belgian seller at the very moment of the devaluation of the pound, without any indication that the latter considered the price as having been quoted in gold pounds; he also observed that the Belgian seller had waited for a fortnight after the devaluation before presenting his claim, thus proving that " the idea of a bonus had only been an after-thought, following the discussion which had arisen in regard to this question in business circles of the most varied description ".

The arbitrator accordingly non-suited the Belgian plaintiff and decided that the American buyer, in remitting £4,320 paper, had fulfilled all his engagements and owed nothing more to the seller.

The costs of arbitration did not exceed $40 for each of the parties (who had mutually agreed to bear costs by equal shares).

It was thus possible to settle, in a few months and with minimum costs, a dispute which, if referred to the courts, would have involved the parties in heavy expenses and cost them still more time and money.

But, it may be objected, the example chosen is particularly favorable for your theory: the plaintiff is non-suited, the award negative, and no question of enforcement arises. But there are other and numerous cases in which the award condemns the defendent to a payment, for instance when the dispute concerns the quality of the goods and the buyer is condemned to take delivery of the wares and to pay for them. In this respect, the International Chamber of Commerce has had to arbitrate disputes

concerning the quality of goods of the most miscellaneous character: mother of pearl shells, artificial silk, cotton and wool, punching and cutting machines, printing machines, apparatuses for the automatic distribution of cigarettes, cement and rolled zinc, etc. Numerous disputes have borne upon royalties due on the transfer of licenses, and there have also been cases concerning notice of the termination of contracts relating to patents protecting hydraulic apparatuses, the opening of a credit in favor of a third party, the apportionment of profits accruing from a river transport worked in common by different navigation companies, failure to deliver an aquaplane within the requisite time-limit, the genuineness of an invention relating to an automatic photographic apparatus, etc.

In each case, according to the nature of the dispute, the International Chamber of Commerce seeks the assistance of an expert or of a jurist, whose competence and impartiality are universally recognized. As for the standing of the arbitrators selected by the Chamber, it may suffice to mention that the President of the Swiss Bankers' Association, the President of the Association of Foreign Jurists in France and the Director of the International Bureaux for the Protection of Industrial, Literary and Artistic Property, are among those who have rendered awards on behalf of the Court of Arbitration of the International Chamber of Commerce.

But, to return to the typical cases described earlier in this article: the arbitrator is a private judge; how can the public authorities co-operate in the enforcement of his award?

Let us be quite frank. Although, in principle, the majority of countries provide for the enforcement of home or foreign arbitral awards, there is always the risk that a clever lawyer may find means of holding up this procedure. The complications which may thus be provoked would, however, be nothing in comparison to those attendant upon a suit, the merits of which are examined first by the district inferior court, then by the court of appeal, and finally by the supreme court of appeal. But a business man, who has won his case before an arbitrator, will not reason thus; he does not consider the difficulties with which he would have had to cope in an action at law; the only ones he realizes are those which actually arise in the enforcement of the award rendered in his favor.

It must, therefore, be emphasized that only in extremely rare and exceptional cases is it necessary to have recourse to the courts to enforce an award: this is the advantage of arbitration and the best possible testimony in favor of this procedure. According to the statistics of the International Chamber of Commerce, 87 per cent of the awards rendered by the Court of Arbitration are freely executed by the losing party. It is hardly to be conceived that a business man of good standing should rely upon the intricacies of legal procedure to escape the consequences of an award to his detriment, when this award is backed by the authority of the International Chamber of Commerce.

Thus everything depends upon the good faith of the parties to a contract. Arbitration is for honest and reliable business men, not for traders of doubtful reputation and experts at quibbling. Before doing business with an unknown firm, it is well to obtain full information as to its standing. Arbitration is not a "cure-all". It cannot provide a safeguard against the pitfalls in the way of those dealing with a certain class of individual whose career ranges between swindling and bankruptcy. But when negotiating with a party, fully conscious of his commercial responsibility and willing to agree to a fair settlement of eventual difficulties, let the business man no longer hesitate; let him conclude his deal and insert an arbitration clause in his contract. If a difficulty arises, he will most certainly find that it pays.

SHOULD ARBITRATORS BE PAID

THE ENGLISH VIEWPOINT

BY

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THE AMERICAN ARBITRATION ASSOCIATION has honored the English Institute of Arbitrators by inviting some one therewith connected to state his personal views on the above subject; the viewpoint must of necessity be somewhat insular in character compared with the view expressed in a counter article to be written by an American, because America has a number of states with varying degrees of law, based on Roman principles and of honor which are hardly comparable with the English system of law and of honor, the former of which has grown up through gradually accumulated case law and of honor arising from practices well established in the feudal days of Old England. England, from the 14th Century, has had the advantages of an unpaid magistracy,[1] the appointment to which has always been vested in the Crown; it was in a statute of Edward III enacted that " two or three of the best of reputation in the Counties shall be assigned keepers of the Peace by the King's Commission to hear and determine felonies and trespasses done against the peace in the same counties and to inflict punishment according to law and reason and manner of the deed ".

Although, with the march of centuries, the number of these Justices has been greatly increased, their task is still similar. This unpaid magistracy do a vast amount of unobtrusive but nevertheless useful work and it has and always has had a strong appeal to that fairmindedness which the ordinary English citizen of character and experience fully understands and appreciates. The men who generally occupy these positions have left their youth behind and are probably more free to devote time and energy and desire occupation in some form of public service—they have arrived at the Shakespeare fifth age of man: " and then the Justice in fair round belly with good capon lined, with

[1] Stat. (1344) 18 Edw., 3 Stat. 2, Chap. 2.

eye severe and beard of formal cut, full of wise saws and modern instances"—or its modern equivalent.

This type of unpaid social service has been somewhat fully put forth because it is the only one in England which closely affects the law in the lives of her inhabitants. In byegone years the Justice was exactly the type of man to whom persons with a grievance, which they did not seek to bring to the courts with their consequent publicity, would go with a view to amicable settlement of their differences. On the northern side of the English border in 1562 the Scottish reformer John Knox, no doubt because of his eminent probity, was called in to settle a dispute between the Earls Arran and Bothwell. One cannot quite picture him asking for the proportionate bawbees.

According to the old law of Scotland, which is based on Roman as distinct from the English Common Law, an "arbiter" was supposed to act gratuitously, as a purely disinterested party who offered his services without hope of reward, for the benefit of the common good. Much the same sort of principle at one time obtained in England.

About a thousand years before the Christian era a wise man said: "In all labor there is profit"; and to the arbitrator who finds his task uncongenial and unpaid there may be comfort in this ancient Eastern proverb. In a later doctrine there may be found greater comfort: "the laborer is worthy of his hire", was the assertion made by one distressingly modern in the application of his sayings.

One may pertinently ask whether parties prefer for their arbitrator—(a) one who has the ripe experience of the trade concerned in the stress and strife of byegone decades or (b) one who, in the fulness of his experience and acumen, still practises the trade concerned; and the obvious further question arises whether they prefer A without price or B with a price commensurate to his normal annual income. In England it usually devolves upon the solicitors to the parties to advise upon the selection of an arbitrator where he is not the previously agreed nominee of an institution and I venture to suggest that in this country B would be found cheaper at the price than A. That there may be exceptions, however, only proves the generality of the rule. The position in England today is that remuneration for the services of an arbitrator depends either upon express promise to pay him or upon an undertaking, to be implied from

his appointment, to remunerate him reasonably. In 1801, an express promise not being proved, the arbitrator failed to recover his fees.[2]

Lord Kinnear a few years ago shewed the modern trend in the following words: "Now that arbitration as professional work has become so common in the ordinary course of business, there seems to me to be no reason whatever for supposing that when a professional man is asked to undertake the responsibility of solving a disputed question, which requires the exercise of professional skill and experience for its solution, he is invited to act gratuitously. I think that, in accordance with general practice, the rule must now be assumed that a professional man undertaking the duties of an arbiter is entitled, in the absence of any agreement to the contrary, to be remunerated for his services as arbiter in the same way as he is entitled to receive remuneration for his services in any other professional employment."

In *MacIntyre Brothers* v. *Smith*[3] the development of the old rule is shewn. In that case one of the parties to an arbitration refused to pay his share of the arbiter's fee, on the ground that as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act without remuneration. *Held*, that rule was not applicable to the modern conditions of business and a professional man could no longer be presumed to give professional services gratuitously and he was, therefore, entitled to his remuneration.

In England the man most in favor as an arbitrator in technical disputes is he who, in addition to having innate judicial qualities, has a thorough and up to date knowledge of the trade or profession concerned; in matters of legal dispute the same cardinal qualities are sought after; the money, if any, received by him normally goes into his income tax return for the general benefit of the community; in having received it he is not under any compulsion as to which deserving cause he may allocate a fair share, whether it be to a party to the reference or some deserving charity; but in receiving it he has done no disservice to the arbitrator who lives by his profession whether in a larger or a lesser degree. Is not the laborer worthy of his hire?

[2] *Viramy* v. *Warne* (1801) 4 Esp. 47 and see *Hardres* v. *Proud* (1655) Sty. 465.

[3] (1913) 50 Sc. L. R. 261.

THE AMERICAN VIEWPOINT

BY

JOHN S. BURKE

President, B. Altman & Company

AMONG the wonders, for which the United States is becoming famous, is the unpaid arbitrator. When foreign visitors are told that thousands of men on national panels have pledged themselves to act, without compensation, whenever called upon as arbitrators, they invariably shake their heads dubiously and declare their inability to understand such a state of affairs.

Nevertheless, this is the prevailing practice in the United States and applies to the lawyer whose fees climb into the thousands per day, to the capitalist whose creed is "Time is Money", to the manufacturer bent upon keeping the wheels of his industry moving, as well as to the small merchant or shopkeeper. The reasons for this policy are to be found in the following circumstances:

When the national system of arbitration in the United States was being established, the men seeking to erect it looked back over the experiences of past years and of other countries. To them it seemed that the decline in the use of arbitration had been almost coincident with the introduction of the umpirage system. When the parties departed from the custom of choosing impartial and competent men and each selected a partisan or advocate and paid him for his services, and then left to these two the choice of an umpire, who alone could render a final decision, uncertainty entered into the arbitration system.

And so the Americans were resolved to profit by this experience. Almost their first step in the organization of a national system was to establish a panel of arbitrators from which men could be drawn at will in the locality desired—who had no interest whatever in the outcome of the controversy; who were not swayed by personal feelings or relations to the parties and who would not be compensated by the parties. Only such men, they felt, would be entirely impersonal, would inspire complete confidence of the parties and would be more likely to be selected from national panels.

It is a fact, of course, that many arbitrators, especially those appointed by counsel or parties, who serve for compensation, are fair and impartial; but such men serve casually, perhaps once

in a lifetime, and are no part of an organized effort to build up a sound practice of arbitration. Their task is to dispose of a particular case, with or without rules of procedure, and their office and functions have only a particular and not a general significance.

It is a characteristic of American psychology that "big names" attract the parties to an arbitration and accordingly inspire confidence in a proceeding. Almost the first question asked by parties is: "What kind of arbitrators have you?". In court, the party knows the case will be decided by a judge of a well-known name; in arbitration he seeks the same privilege. A list of names of unknown men will not lead him to arbitration. But he will probably be influenced by the knowledge that busy men of affairs are willing to give their time to help him solve his difficulties.

On the other hand, men of outstanding ability and reputation are not interested in serving in small cases for the 10 or 20 dollars which the parties can pay, but they are interested in serving the cause of justice. Since its quality is the same in a case involving $1,000 or $100,000, this problem is solved by having all arbitrators serve as a public duty, without pay, thus avoiding bickering over fees or the necessity for estimating the worth of one man above another.

The unpaid arbitrator performs another public service of a high order, for he helps to maintain the national system of arbitration by contributing services which enable the tribunals to charge a small administrative fee for hearings, without which income they could not function. The arbitrators thus take a personal pride in the system under which they serve and believe they not only advance justice, but also the standards of the service as a whole.

The professional arbitrator is neither popular nor common in the United States. American opinion seems not to have reached the point where it favors the establishment of a class of professional arbitrators who charge fees for their services. Membership on panels furnishes a sufficient number of available men on a voluntary basis to preclude a serious discussion of the establishment of such a class. Furthermore, men who would normally constitute such a class are experts in their own callings, from which they draw their income. To charge what their services would be worth, on the basis of these earnings, might

bankrupt the parties; to take less than this amount seems to belittle their service and has a tendency, when indulged in, of making a joke of the small fee. On the contrary, the honor of the office attracts them as individuals, not as a class.

Furthermore, arbitration, in the public mind, is, in certain respects, still in competition with the courts. It, therefore, must present definite advantages to appeal to the public. One advantage must be that it is less expensive than a court proceeding. With the modern tendency of clients to be represented by counsel, the proceeding is increasing in cost; with the necessity of an administrative fee to regularize proceedings, another modern element of cost is added. To pay arbitrators the fees their expert services could command would make arbitration far more expensive than a court proceeding where judges are paid by the taxpayers.

Under the American system, arbitration is designed not only to provide a tribunal for the business man of large affairs, who may not be primarily concerned with costs, but offers a " poor man's court " where the small litigant, the wage-earner and the injured poor may find quick and inexpensive justice. Since nothing sends up costs as much as arbitrators' fees, they are eliminated in the interest of economy.

Seven thousand men—the busiest and most influential in the country—have given the lie to the oft-repeated assertion that they think of nothing but their pursuit of the American dollar, by becoming members of an unpaid panel of arbitrators. By such an impressive majority have they answered, in the negative, the question " Should Arbitrators be Paid? ".

SYMPOSIUM ON ARBITRATION IN INSURANCE

FOREWORD

BY

GEORGE S. VAN SCHAICK

HONORARY EDITOR

Former Superintendent of Insurance of the State of New York; Chairman of the Insurance Arbitration Council; Member of the New York Bar; Vice President of the New York Life Insurance Company.

THIS *Symposium on Arbitration in Insurance* presents for the first time a picture of some aspects of self-regulation by a great industry and the story of its cooperation with other agencies for the advancement of public welfare. It illustrates how arbitration has been made the agency for such regulation and welfare.[1]

The Insurance Arbitration Council, which has cooperated in planning this *Symposium*, is composed of representatives of the various branches of insurance and affords a notable instance where they have all come together for study and discussion of the maintenance of goodwill within the industry and between the industry and its policyholders and the public. This is a long step forward from the year 1601, when a first venture in arbitration was made under the British Marine Insurance Act, setting up what seems to have been the first tribunal to fill the gap between the observance of custom and the coming of legal regulation. So, today, there are new problems that may best be solved without the looseness of custom or the rigidity of law for the benefit of the industry and of the public.

The experiences set forth in the *Symposium* by some of my distinguished colleagues indicate not only very real achievements but show the trend of opinion. I esteem it an honor to introduce them to the readers of THE ARBITRATION JOURNAL.

[1] Casualty insurance companies using arbitration, in the order of their frequency, are: Hartford Accident & Indemnity, Fidelity & Casualty, Zurich, General Accident & Liability, New Amsterdam Casualty, General Accident, Great American Indemnity, Metropolitan Casualty, Home Indemnity, Commercial Casualty, United States Fidelity & Guaranty, Aetna Casualty & Surety, Liberty Mutual, Travelers, American Mutual Liability, Globe Indemnity, Massachusetts Bonding & Insurance, United States Casualty, Interboro Mutual Indemnity, Royal Indemnity, American Surety, London Guarantee & Accident, Employers Liability, New York Casualty, United States Guarantee, Fireman's Fund Indemnity, American Lumbermen's Mutual, Standard Accident, Eagle Indemnity, Glens Falls Indemnity, Sun Indemnity, Auto Mutual Indemnity, General Exchange, Norwich Union Indemnity, Continental Casualty, Century Indemnity, Phoenix Indemnity, London & Lancashire Indemnity, Preferred Accident, Lumber Mutual, Manhattan Mutual Automobile, American Motorists.

RELIEF FOR INJURED PERSONS AND THE COURTS

BY

STANLEIGH P. FRIEDMAN

Chairman, Committee on the City Court of the Association of the Bar of the City of New York

> To no one will we sell, to no one will we refuse or *delay*, right or justice. *Magna Carta*, Cap. 40.

WHOSE fault is it? If the following conditions prevail, who is responsible for them, and who shall be charged with the duty of their correction or, at least, their amelioration? And how may they be rectified?

In 1919, the Carnegie Foundation published a "Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law" by Reginald Heber Smith. In this work the author shows that not by reason of any intentional wrongdoing, but because of neglect to face the issue, the expense and delay in securing justice and relief has mounted so high that frequently the poor cannot afford either to wait or to pay for them. In the category of defects in the administration of the law, the author lists "The First Defect—Delay" and quotes from an address on government and citizenship by Elihu Root as follows:

> While the law is enforced, justice waits. The possibilities of delay and of forcing a compromise to avoid expense and annoyance induce litigation by those who wish to escape the faithful performance of their contracts. The calendars are crowded with such cases. In such a game the poor stand little chance against the rich, or the honest against the unscrupulous.

A "Survey of Litigation in New York", published in 1931, by the Institute of Law of the Johns Hopkins University introduces the subject by the following quotation from a report of ex-President Herbert Hoover when he was Secretary of Commerce:

> The aggregate economic loss to the United States through the necessity of referring to courts the trial of disputes arising in the course of trading would stagger the imagination if it could be accurately compiled, both as to the actual cost and the indirect drain upon natural resources. Next to war, commercial litigation is the largest item of preventable loss in civilization.

The survey presents these amazing figures for the period 1930-1931: An early stage of the study of the cost of civil litigation in

New York City alone, indicated an outlay of public funds by City, State and Federal Governments during the preceding year of a gross total of $17,000,000. If to this figure were added the cost of litigation, in time and money to the parties, the total would be shocking. Delays in reaching trial in the various courts at that time varied: in the Supreme Court from one year in non-jury causes to two years for jury causes in New York County; in the City Court for New York County, from eight months for commercial causes to three years for general non-commercial causes; in the Municipal Court of the Borough of Manhattan the calendar of jury causes was eight months to more than a year behind, and in other Boroughs of New York City as much as three years.

More interesting, however, are the statistics respecting the collectibility of the judgment when it has been procured one to three or more years after the institution of the action. In New York County, Johns Hopkins Institute examined 44.41 per cent of the Supreme Court judgments for the year 1930; to wit, 4,279, totaling $33,307,465.69. Of these, only 17.13 per cent, or a total of 733 judgments amounting to $2,237,184.33, were marked satisfied in whole or in part. In the City Court for New York County there were 6,427 judgments entered, totaling $9,778,452, and 573 judgments aggregating $700,836.31 marked satisfied in whole or in part.

In the American Arbitration Association Report on Relieving Conditions in Inferior Courts in New York City (1935) appears the statement " these studies [*i. e.*, by Institute of Law of Johns Hopkins University] and a survey made by the American Arbitration Association show the congestion in the courts to be due largely to automobile accident claims and other injury cases. Lawyers experienced in trial work estimate that approximately 65 per cent of these cases involve injury claims in which insurance companies are the defendants, and the delay in bringing cases to trial averages between two and three years. These cases bear hardest on the poor for they involve doctors' bills, hospital care and expenses, loss of earning power and other hardships."

The Report of the Judicial Council of Massachusetts for the year 1932, at p. 12, *et seq.*, states:

> The majority of tort plaintiffs probably claim a jury trial because they think, or they are advised by their lawyers from habit, that a jury is more

apt than a judge to find for the plaintiff and for larger damages. This appears to be a myth which may have been a truth in some bygone time, and is still handed down to younger lawyers and accepted by them as an immutable truism. . . . . Another argument advanced in favor of claiming jury trials is that in trials to a judge too much depends on the personal equation of the particular judge who happens to hear the case—that there are "plaintiff's judges" and "defendant's judges". A study made some years ago of the individual trial work of the nine judges of the Boston Municipal Court, covering four years and over 6,000 trials, produced a rather startling result. Five of the nine had exactly the same percentage, 63 per cent of findings for the plaintiff, 37 per cent for the defendant. And the extremes were 60 per cent and 67 per cent.

To the contrary is a Report of a Special Committee of the Board of Justices of the Municipal Court of the City of New York, corroborating a statement of the Brooklyn Bar Association, to the effect "that 95 per cent of the demands for jury trials are made by defendants," and the Annual Report of the President Justice of the Municipal Court to the Mayor of the City of New York for the year 1930, in which he states, "one can reasonably infer the cause for the demands for jury trials on the part of the defendant is to a great extent to delay the inevitable day of judgment."

Everywhere, in councils of Bar Associations, in Chambers of Commerce of the larger industrial centers, in civic and trade organization journals and reports, and in the press of the country, the charge was mouthed, printed and publicized, "Justice delayed is Justice denied." An adequate increase in the number of judges to make even the slightest impression upon congested calendars was out of the question for financial reasons. Efforts of individual judges and even of the courts themselves held but little hope.

In this emergency, arbitration as a process and procedure to dispose of pending litigation and to assist the courts to bring their calendars up to date seemed a remedy compounded for the occasion. The American Arbitration Association, which, since its organization in 1926, had shown itself a militant body to advance the cause of arbitration as a security against litigation, and as such had made notable progress in its campaign to induce trade organizations and industries to insert compulsory arbitration clauses in their uniform contracts, and had secured the passage of State and Federal legislation to render such clauses effective, saw its opportunity for greater service, and determined to grasp it.

Firstly, it enlisted the services of a group of prominent lawyers who formed a Special Committee to stimulate greater interest and more extensive use of arbitration in the courts. The Special Committee of Lawyers then secured the cooperation of the Committee on Courts of Limited Jurisdiction of the Association of the Bar of the City of New York. These two groups forthwith united and only too readily obtained the encouragement and cooperation of the President Justice of the Municipal Court of the City of New York and his Associate Justices. The extremely valuable contribution to the cause of arbitration by the President Justice and the other Justices of this Court and the results of their efforts have been related in an able and interesting article by Honorable Pelham St. George Bissell, the President Justice of the Court, appearing in this issue of THE ARBITRATION JOURNAL.[1]

The City Court of the City of New York has sponsored the arbitration process in that Court with every means and resource at its disposal. It inaugurated an Arbitration Calendar and then conducted in every county division in the City of New York a general Calendar Call, preceded by an emphatic announcement that cases on the general calendar, which in some instances were three or more years from a possible trial, could be sent to the Arbitration Calendar and promptly disposed of. A panel of arbitrators selected by the various local bar associations, approved by the Chief Justice and consisting of the outstanding lawyers in each county division, was widely publicized by official notices in the New York Law Journal and by the entire press of New York City editorially and in the news columns.

These were some of the steps taken by the American Arbitration Association, the Association of the Bar of the City of New York, and the courts and judges, to organize their facilities in anticipation of the extensive use of the process of arbitration.

But the problem remained to be solved of how to bring home to the "client" what he could gain personally by the use of arbitration, and what were its advantages. In furtherance of this objective, encouraged by the suggestion of Chief Judge Crane of the New York Court of Appeals that tort cases offered a potential field for arbitration, and acting upon the idea that the casualty insurance companies were, in fact, "clients" in, if not parties to, a great preponderance of the pending negligence liti-

[1] Page 38.

gation, congesting the court calendars in New York City, the Committee on Courts of Limited Jurisdiction of the Association of the Bar invited the general counsel and appropriate executive officers of these insurance companies and of various transportation companies in New York City to a conference to discuss arbitration in this class of cases. The conferees seemed impressed and agreed to a test trial of the procedure by submitting a few selected cases to be arbitrated by the American Arbitration Association.

What follows is a matter of history; 43 Insurance Companies in New York City have submitted 3,915 casualty cases actually on the City Court and Municipal Court calendars for disposition by arbitration. Honorable George S. Van Schaick, former Superintendent of Insurance of the State of New York, in his annual message to the Legislature, called attention to the advantages of arbitration as a means of settling disputes and stated that he was having the question studied. The present Superintendent of Insurance, Honorable Louis H. Pink, has given the history of the progress of arbitration in insurance together with his views in an article in this issue of THE JOURNAL. The insurance companies have thus, in the opinion of the writer, refuted the charge of bad faith which was frequently brought against them in our courts and in reports dealing with the subject, that they sought by improper and unethical methods, delay and procrastination to wear or tire out their opponents so as to effect settlements on starvation terms; that such delays were most effectively secured by demanding jury trials in courts already overwhelmed with congested trial calendars. They have demonstrated that their interests are best served not by protracted delay, but by an interval of six months between the time of receiving notice of the claim and a trial thereof. This period permits the nature and extent of injuries to become established, examinations to be conducted, investigations to be made and preparations laid for the trial. Delay beyond that time may result in possible loss of witnesses, which is a matter of consequence in a city as large as New York, where there is a constant mutation of residence, and in the intervention of other prejudicial factors. Tying up of large reserves, pending the disposition of cases, is also a consideration of importance to the insurance companies.

Of the 3,915 casualty cases on the City Court and Municipal Court calendars submitted for arbitration, so far 1,735 were ar-

bitrated or disposed of; in 1,497 cases plaintiffs' counsel refused to arbitrate.

Consequent upon the inauguration of the Arbitration Calendar in the City Court in connection with the general call of the calendars of that Court, as related above, it is surprising to know that there were an insignificant number of cases submitted to arbitration, notwithstanding the splendid efforts of the justices of the court and the willingness of many of our most prominent lawyers to act as arbitrators and to permit that fact to be publicized.

The question then arises: Why have 1,497 plaintiffs' lawyers out of a total number of 3,915 cases refused to arbitrate when their adversaries have signified their willingness to do so? Why have the lawyers not taken advantage of the arbitration calendars in the City Court in preference to waiting years to have their cases reached for trial? It is easier to credit the force of the arguments that in arbitration there is no right of appeal, no record upon which to appeal, no legal restriction upon the admissibility of evidence, unfamiliarity of the arbitrator with the questions involved and lack of judicial experience, etc., than it is to understand why parties appearing personally in causes without lawyers so frequently refuse arbitration. When a campaign to relieve a shocking congestion in the Municipal Court in one of the districts of the Bronx was made some few years ago, letters were sent by a committee of the Bar Association to the parties as well as to their attorneys in a substantial number of cases, explaining the advantages of arbitration and the dangers and disadvantages of a trial which could not be had for two or more years thereafter. The response was not gratifying—in fact it was extremely disappointing.

Through the efforts of the American Arbitration Association's Special Committee of Lawyers and the various bar associations in the City of New York, lawyers are now responding to a system of education demonstrating the economy of time, money and effort, promptness, fairness and finality of arbitration conducted under "Sound Rules and Administration." [2]

[2] See an article entitled "Sound Rules and Administration in Arbitration" by J. Noble Braden, Secretary of American Arbitration Association, published in *University of Pennsylvania Law Review*, December, 1934. *Volume 83*, No. 2.

It seems to be agreed between the cooperating agencies that the following private and public benefits flow from the extension of the use of arbitration:

1. The injured person is benefited by a quick, inexpensive and fair disposal of his claim; likewise the individual defendant or person against whom the claim is made.
2. The insurance company lessens its reserves and cuts its cost of settlement and retains the good will of the participants.
3. The lawyers, by representing their clients, forego none of their privileges or remuneration and have a lawyer acting as arbitrator who serves without compensation and who may be selected from a list of outstanding lawyers in the community.
4. The Courts and the public benefit through a reduction in the pending cases and in the cost of litigation.
5. The public benefits through the reduction in the number of cases on the calendar and through the elimination of costly jury trials.

But what can be done to educate the citizen, *before* he becomes a litigant or party to a case, as to the merits and benefits of arbitrating his cause of action? The answer seems to be to make him "arbitration conscious" so that he and his lawyer, if he sees fit to have one, may give the necessary consideration to the advantages of arbitration before haphazardly instituting an action at law.

This is the goal and the target to which the friends of arbitration should direct their efforts. Success has attended their labors in commercial arbitration and in the activities of industrial groups. The field of arbitration, to afford relief to injured persons, remains to be attacked. A new psychology must be instilled and a new state of mind organized.

This is not extraordinary. As new devices and machines enter into use in our daily lives, new forms of governmental regulation and taxation confront us, new forms of amusement, entertainment and diversion occupy our recreational hours, new methods of warfare, devised in less sane intervals, force us to some program of preparedness, so in each instance a need of correlating

our lives to these innovations has arisen and been satisfied. I shall not labor this thought but simply point out our subconscious acceptance of the telephone, the automobile, the camera, talking motion pictures, radio, airplanes, chemical warfare, and how we have become " conscious " thereof.

A campaign for automobile accident prevention by safe driving is being waged everywhere. Industry is continually conducting a campaign for accident prevention by making the worker conscious of the economy and wisdom of precaution. Accident prevention—fire prevention—war avoidance—prevention of disease—these are heard of everywhere and at all times. To educate the public to litigation prevention, to the consciousness of the existence of a method, forum and process by which grievances and injuries can be heard and adjudicated without delay, without expense, without recourse to the courts, with impartiality, with justice, expedition and finality, is an objective worthy of our efforts. It can be done by educative processes, by publicity, by the cooperative activities of the leaders of industry and labor and by the press, as well as by the lawyers and the judges among us.

ARBITRATION OR LAW SUITS

BY

LOUIS H. PINK

Superintendent of Insurance of the State of New York

THERE is no way of knowing what litigation costs this country. The public money paid out for the maintenance of the courts, judges' and clerks' salaries and other direct expenses is tremendous but insignificant when compared with the expense to litigants. With all its faults, the jury system is the fairest and most satisfactory judicial tribunal yet known to man. But a great many of the controversies which go before the courts can and should be adjusted without the delay and expense of a jury trial, or even of a court without a jury.

In ordinary court practice most cases are settled, and most settlements are good settlements. Arbitration is a step somewhere between a settlement and a trial. Under the law of New York and twelve other states it has been incorporated in the judicial structure and is just as binding as a court decision. Where there is no great principle of law at stake which should

be passed upon by the higher courts, the lawyer who is seeking the expedition of business first tries to settle. If he cannot settle, there is still another possibility before going to trial—he can offer to arbitrate. If he cannot get all parties to consent to arbitrate, there is no recourse except a trial.

Movements for social progress, no matter how laudable, are apt to die out unless there is some consistent driving force always at the wheel. Insurance does not sell itself, and neither does arbitration. Someone has got to keep eternally at it reminding people and urging them on. The American Arbitration Association is the outstanding representative of this movement. While located in New York, it stimulates, and so far as it can directs arbitration in the United States. The Association has an experienced panel of some 7,000 arbitrators, about 2,000 of whom are in New York City. Those who have volunteered to serve include outstanding accountants and professional and business men of the highest repute and experience as well as lawyers. There is a nominal fee for each case submitted, but the arbitrators serve without compensation. The Association is not only in touch with similar organizations in various cities of this country, but has established an inter-American system of arbitration, and is endeavoring to organize the movement in many of the Central and South American republics for the convenience of American business men. It cooperates with Chambers of Commerce and Bar Associations throughout the country. Through its offices, approximately 8,000 controversies have been submitted.

Bar Associations in many cities now have arbitration committees. While lawyers are the great offenders in ambulance chasing and the making and prosecuting of fictitious claims, it must not be forgotten that they are also perhaps the greatest force in the world for social progress. They are in the main our legislators and our important political officers. They are alert and active in every movement for social progress. Through the Bar Associations, lawyers have cooperated fully with the American Arbitration Association in promoting and perfecting arbitration procedure.

From no source has the American Arbitration Association received greater cooperation and more effective encouragement than from the institution of insurance. Former Superintendent George S. Van Schaick of the New York Insurance Department has been an active and enthusiastic leader. He is now Chairman of the

Insurance Arbitration Council of the American Arbitration Association and is continuing the work which he began as Superintendent. We have done our best to carry on the work since his resignation. Shortly before retiring as Superintendent, he sent letters to insurance companies doing business in New York requesting their cooperation and also their reaction and constructive criticism. 142 companies and groups of companies replied. 113 of these were in favor of arbitration, only 14 definitely opposed, and 15 non-commital. Out of 81 fire company replies, 73 were favorable. Out of 36 casualty executives, 27 endorsed the movement, and, even in the life field 13 companies out of 25 favored the extension of the movement.

While the use of arbitration can undoubtedly be further extended in the arbitration of disputes between life companies and their policyholders, the field is considerably restricted. Life insurance is perhaps the most scientific business there is, and few disputes arise, excepting where there is a charge of misrepresentation or bad faith. Arbitration is not for fraudulent cases, but only where there is a legitimate dispute, usually of fact. Even in the life field sympathetic approach will undoubtedly discover many instances in which it will be helpful both to the policyholder and the company to submit the dispute to arbitration.

There is no very great opportunity for the use of arbitration in fire insurance. This is in large part due to the fact that the standard form of policy already provides for an appraisal of the loss much in the way an arbitration proceeding is conducted. This appraisal is in itself practical arbitration and has been used for many years. The difficulty is that the courts have so interpreted the New York Standard Fire Insurance Policy Form, which provides that " each shall on the written demand of either select a competent and disinterested appraiser " who shall select a " disinterested umpire ", that the company can avoid an appraisal if it desires. The courts hold that while the companies can hold the policyholder to arbitration, the policyholder cannot hold the company. The Department has attempted to remedy this defect through legislation, but so far has not been successful. The Massachusetts standard policy is in this respect preferable to that of New York. It provides that the reference of a dispute as to amount to three disinterested men " shall be a condition precedent to any right of action in law or equity to recover for such loss ". But even in Massachusetts, it is the amount of the

loss rather than liability which must be referred to appraisers or arbitrators. While the officials of the fire insurance companies plainly state that there is not much demand for arbitration, they are most sympathetic and express a willingness to study the situation and do everything possible to further its use.

The fertile field for arbitration is, of course, the casualty business. Companies are now, through the efforts of the National Bureau of Casualty and Surety Underwriters, arbitrating disputes between each other. The issues of fact which arise in the countless suits brought against casualty companies on accident and disability claims offer a very real opportunity to cut the expense of litigation, further the adjustment and settlement of claims, minimize the time for payment, and create good will which will react favorably to the entire insurance industry. The elimination of wasted time, the simplification and humanizing of the procedure make for good will. There is a better feeling between litigants, and an absence of rancor which often accompanies long drawn out court battles.

The great difficulty is not to get the insurance company but the plaintiff's attorney to consent. Here, too, success is being achieved. The number of refusals by plaintiffs' attorneys has decreased from 53 per cent in 1935 to 44 per cent in 1936. This could not have been achieved without the active participation and cooperation of the courts. Presiding Judge Bissell of Manhattan, Judge Nathan Sweedler of Brooklyn, and Judge LaFetra of the City Court, have by their keen and active interest assured a trial of the experiment under favorable circumstances.

The companies which have used arbitration most and have apparently found that it pays are the Hartford Accident, the Zurich, the Fidelity & Casualty, the Loyalty Group and the New Amsterdam and U. S. Casualty. The number of cases submitted by these companies is 1,798, divided as follows: Hartford Accident 545; the Zurich 248; the Fidelity & Casualty 422, Loyalty Group 322, New Amsterdam and U. S. Casualty 261. But the number of cases submitted does not alone tell the story. The submission of a case by the companies does not necessarily mean that both sides will agree to arbitrate, and that an award will actually be made. The percentage of cases actually arbitrated or disposed of as the result of a consent of the company to arbitrate is from 10 per cent to 25 per cent of those submitted.

There can be little question but that the spread of arbitration in the insurance field is desirable from many points of view. There is no great amount of sales resistance to be overcome on the part of the companies. Very few are actively opposed. The real problem is how to make arbitration effective, how to improve the system so that it will be easily applicable to a very much larger number of cases. The aim is to make it so general that it will be not merely an interesting experiment but will save real money and real time for the public and the companies.

The Metropolitan Casualty Company attempted a unique experiment several years ago. In 1928, it cooperated with the Association in an effort to popularize arbitration and publicly offered to arbitrate all meritorious claims. It went further and offered a special arbitration endorsement or rider to all policies under which it agreed with the assured "to endeavor to adjust by arbitration rather than by litigation all claims for damages on account of bodily injury or damage to property of others covered by the attached policy". Such arbitrations were to be conducted under the standard rules of the American Arbitration Association. The agreement was limited to cases where the amount of the claim was limited to $5,000 for any one person, and the aggregate of the claims arising from any accident to $10,000. Little direct result came from this innovation. It is suggested by Edmund J. Donegan, then its Vice President and General Counsel, that the reason for failure was largely because only one company availed itself of the plan, and there was a lack of cooperation. It is not unlikely that if such a rider were adopted by a large number of insurance companies and properly publicized, the result would be more encouraging. This matter has been given consideration recently at the suggestion of one of the other companies.

Many other suggestions have been made for strengthening arbitration in insurance. It has been said that the Insurance Department itself should have a permanent bureau devoted to this service. While the Insurance Department believes in it, sponsors it, and will do everything possible to forward the movement, such a bureau would merely duplicate the work of the American Arbitration Association and the Bar Associations and would be unwise expenditure of the state's funds. If a State Bureau is to be established it would more properly be in direct connection with the courts.

Some enthusiasts would make arbitration compulsory just as the appraisal of a disputed fire loss is made compulsory in Massachusetts, before the courts can be resorted to. Eventually some such provision may be wise and proper but I doubt if we are yet ready for it. Arbitration is still in the experimental stages. We know it is good but it has not yet been worked out as a practical solution of court delay and expense. When it has further developed and has won the public confidence to a much greater extent than it has today, it may very well be that some such compulsory plan can be put into force.

The suggestion that all companies adopt riders to policies such as the Metropolitan Casualty uses, under which the company agrees to arbitrate, is at least worth the serious consideration of the companies and of the National Bureau.

So far as insurance is concerned the main difficulty to be overcome is to get the companies to submit a larger number of cases and to secure the consents of the plaintiffs' attorneys. While 43 companies are cooperating, only about half a dozen of them refer a substantial number of cases to arbitration. Many of the companies pick a few cases here and there which they think may be desirable to arbitrate from their own point of view. This will never get us anywhere. The practical way to break the jam is for each of the companies participating to submit a substantial number of " run of the mill " claims for arbitration. If this were done and continued for a number of years we should definitely know whether arbitration is so efficient and effective that it can in a large measure supplant trial by court and jury.

A number of companies have agreed to submit a definite number of cases each month to arbitration without selection. These companies are contributing most to this movement. From the immediate point of view that is the practical and effective way of securing a fair trial of a worthwhile social experiment.

To my mind arbitration has broad significance in insurance. It should be part of the general policy of claim procedure. This Association has been effective and will be more effective as the years go on in bringing about uniformity, a higher ethical standard, and a closer understanding between the companies themselves and with the public. Arbitration is not only valuable in itself but as a part of this claim procedure. We expect it will save time and money, but it is still more important as a force for mutual understanding and good will. The claim adjuster is

not merely a negative agent who is brought in after trouble has occurred. In a sense, like the broker, he is a public relations man. His dealings with the claimants and the public make the reputation of insurance. The old feeling that the insurance companies grab as much as they can in premiums and pay as little as they can in claims is gradually disappearing. It is disappearing because most of the companies want to be fair and equitable. It is no real advantage to any company to resist just and meritorious claims on trivial technicalities. It is no advantage to any company to pay less than the claimant is justly entitled to. Neither is it any advantage to buy off fraudulent claims with " nuisance value " settlements.

Greater liberality with honest claimants and less liberality with dishonest ones will go a long way to secure greater public confidence. If the companies are ready and willing to arbitrate all honest disputes and the public is aware of that fact, policyholders will have greater confidence in insurance companies. From the insurance angle it is as an adjunct to claim procedure that arbitration may prove most valuable. If arbitration is to be extended and developed in the insurance field it must be largely through the enthusiastic support of claim adjusters. You make the reputation of the companies which you represent. As Superintendent Van Schaick so well put it in his address before this Association two years ago, " Claim men are producers of reputation that is an asset beyond value ".

ARBITRATION AS A PUBLIC BENEFIT

BY

PELHAM ST. GEORGE BISSELL

President Justice of the Municipal Court of the City of New York

THE endeavor to settle actions without recourse to a court trial is a matter of ancient origin. For years men have recognized the enmity which a formal trial frequently evokes and have tried to evade both the enmity and possible delay by submitting their controversy to some third party in whom they felt confidence. That process today is actively working in conjunction with the regular process of the Municipal Court of the City of New York.

The settling of disputes and litigation by arbitration dates back to 1647 when the so-called " Board of Nine Men " was

established in the town of New Amsterdam as a court of arbitration. In this state a general arbitration law was passed in 1791 entitled "An Act for the determination of differences by arbitration." In 1861, the Chamber of Commerce of this state established an arbitration committee, and thereafter in 1871 an official position of arbitrator with the title of "Arbitrator of the Chamber of Commerce of the State of New York" was created. The jurisdiction and practices of this tribunal were further fixed, and the salary also set forth, by an act passed in 1875. No money was appropriated, however, for the payment of this salary until three years later. The same act that appropriated the salary also abolished the provision for any further salary of the arbitrator, and also abolished the provision for a clerk. This arbitrator continued to function during the years 1874 to 1881, and the laws providing for the establishment of this tribunal have never been repealed.

In the settlement of disputes before trial two methods predominate, arbitration and conciliation. These are essentially distinct. When the parties agree in advance to abide by the award of a third party, the mode of settlement is designated as arbitration. Where no such agreement exists, but the offices of a mediator are used to secure an amicable arrangement between the parties, the process is designated conciliation. Both are used effectively in the Municipal Court of the City of New York.

Under the provisions of Section 8 of the Municipal Court Code, the Board of Justices are given power to adopt and amend rules providing for the establishment of a system of arbitration and for the procedure thereof. Pursuant to this section the Board of Justices have adopted rules which have been in effect since May 1, 1917. These rules provide that where parties have any controversy they may submit the same for arbitration to a Justice of the Municipal Court or to any other person upon whom they agree. A party submitting to such arbitration cannot be either an incompetent or an infant.

To start the machinery of arbitration going, the persons desiring to submit to arbitration sign a consent containing the name of the arbitrator, a brief recital of the nature of the controversy to be determined and a statement that they will abide by the rules. This consent is then filed with the Clerk of any district and a copy is forwarded by the parties to the arbitrator

named. The arbitrator proceeds to hear the controversy forthwith. He is not bound by rules of evidence, and may receive such evidence as he considers equitable and just. The parties may be represented by counsel, but no record of the proceeding is taken. The arbitrator incurs no expense, except upon the consent in writing of the parties. After the first hearing neither party may withdraw from the arbitration unless all the parties consent or the arbitrator directs a discontinuance of the proceedings. When the arbitration is completed, the arbitrator makes his award, in writing, and files the same forthwith, together with his opinion, if any, with the Clerk of the district in which the consent to arbitrate was filed.

Unless both parties file a request not to enter a judgment, the Clerk, two days after filing of the award, enters judgment in accordance therewith, provided, however, that the award has been filed within thirty days from the date of filing the consent. The time within which the Clerk must enter judgment may be extended by stipulation in writing for a further period not to exceed 30 days. No fees or disbursements of any kind are paid to the Clerk where the parties submit their controversy in the first instance.

Since the adoption of these rules other means of obtaining the benefits of arbitration have been inaugurated by the President Justice in cooperation with the American Arbitration Association. Attorneys for both parties to pending litigation are written to by the President Justice, requesting their assistance in disposing of this litigation, which, owing to the congested calendars, may not be disposed of for about 15 or 18 months. This condition exists in the Municipal Court only in regard to so-called tort actions, which usually are those involving accidents resulting from negligence in some form or other. Where both parties consent to submit to arbitration, the matter is then forwarded to the American Arbitration Association which has a list of attorneys who rank high in the legal profession, and have consented to serve as arbitrators without compensation.

Recently, the President Justice, in cooperation with the Association of the Bar of the City of New York and the New York County Lawyers Association, caused to be distributed to attorneys at the time of the filing of the summons, a pamphlet directing their attention to the fact that arbitration of such litigation could be invoked by writing to him or to the committee.

Figures received from the American Arbitration Association show that as of November 30, 1936, 3,915 cases have been submitted for arbitration by insurance companies and other litigants, and of these, 1,735 have been removed from the pending trial calendars by arbitration or settlement during the course of such arbitration proceedings. In 1,497 of these cases, attorneys for the plaintiff have refused to consent to arbitration. The remaining cases are still in the process of negotiation. In the first 11 months of this year, through the mutual cooperation of the Association and the President Justice of the Municipal Court, 2,067 of these cases have been submitted for arbitration, as compared with approximately the same number during the preceding two years.

In order to make arbitration successful it requires a system of educating attorneys and litigants in the advantages to be derived by submitting their controversies to arbitration. Particularly does this apply to members of the Bar who have always opposed arbitration upon the theory that it may affect their incomes by depriving them of clients and business. It is essential that the benefits be made clear both to litigant and counsel and that they realize that arbitration provides an inexpensive and simple method by which a person may obtain redress for a wrong without delay and devoid of complex procedure, and without legal technicalities. Not only does it simplify procedure, but it eliminates waste and loss of time in waiting for cases to be reached for trial, even though the case finally appears upon the trial calendar. From time to time too many cases appear upon these calendars and cannot be reached on a particular day, thus necessitating adjournment. It also happens that attorneys or litigants are unable to proceed to trial on a particular day and this too, necessitates another appearance in court and a further wait for assignment to a particular part for trial. To the attorney this means loss of time which could be devoted in some other direction, and to the litigant it may mean both loss of time and additional expense. Often these adjournments make it difficult for witnesses to appear at the time of trial.

Experienced attorneys who specialize in litigation are authority for the statement that litigation is not a lucrative practice. Nor is the litigant who is finally successful a victor in any sense of the word. The expense of litigation is costly and the statutory

costs which may be awarded by the court are insufficient to cover the outlay.

While court calendars in the Municipal Court in every borough are practically up to date, the so-called negligence cases in which jury trials have been demanded, particularly in the boroughs of Manhattan and Brooklyn, require approximately 18 months in Manhattan and two years in Brooklyn before they are reached for trial. While the Court is making some progress in the reduction of this waiting time, it must dispose of a strong incoming tide of current litigation, in which this type of action predominates.

By immediately submitting the action to arbitration at the time it is instituted one can readily see the advantage from the standpoint of obtaining a speedy disposition. When attorneys or litigants submit their controversy to arbitration, a date and hour may be fixed which is mutually convenient to all concerned, thus avoiding adjournments and many attendances at court. Such elimination of lost time serves to keep the costs of the litigant to a minimum, as attorneys do not need to give their attendance, except upon the day of hearing, and witnesses enjoy the same benefit. Under such circumstances fees paid to witnesses are a minimum cost.

Today arbitration of disputes is gradually becoming recognized as beneficial in practically every industry. Many contracts are now drawn having an arbitration clause, which provides for the settlement by arbitration of any disputes which may arise. Outstanding industrialists of each particular group often are willing to act as arbitrators, which enables litigants to have their case decided by persons who are thoroughly familiar with the custom and usage of the particular trade or business. Such benefits are apparent to all, and litigants, who take advantage of arbitration as a means of settling their differences, will find it a most satisfactory means of obtaining even-handed and speedy justice.

GOOD WILL AMONG INSURANCE COMPANIES

BY

JAMES A. BEHA

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CASUALTY insurance, in its indemnifying function, is essentially an arbitration. A casualty insurance contract is as definitive as contract experts have been able to make it. But no contract could name the infinite combinations of circumstances which its terms would cover, let alone list a schedule of monetary payments for claims rising out of such combinations. The contract is the basis for the adjustment—or arbitration—of claims, for determining, first, if a liability has been incurred, and if it has, the extent of the liability. Every claim settled this side of the courts is a successful arbitration between the insurance company and the claimant.

This arbitral principle, native to the casualty insurance business, is undoubtedly an important reason why the companies are proponents of the arbitration idea, among themselves as well as in their relations with the public. It was entirely natural that the National Bureau of Casualty and Surety Underwriters should have developed, within the sphere of its claim activities, a procedure for arbitrating claim disputes which arose among or between its members.

The National Bureau of Casualty and Surety Underwriters is the trade organization for the majority of stock casualty insurance companies doing business in the United States. The core of its activities is formulating uniform rates and establishing rules to govern equitable competition among its members. It also maintains a Claim Department for dealing with the many and complex claim problems of the companies, and a Conservation Department, through which the Bureau has long been a leader in the national accident prevention movement. The basis of all the National Bureau's activities is the promotion of good will among the companies, and between the companies and the public. To the casualty insurance business, which is so intimately concerned with the public welfare, and where excessive competition and unfair practices would be detrimental to the companies and public alike, an active cooperative spirit is a vital necessity.

The Claim Department of the National Bureau was organized in 1927 with a threefold program: to accelerate the proper admin-

istration of casualty claims for prompt and just settlement of meritorious claims; to combat claim frauds; and to promote activities within the claim departments of its members which would assist in advancing the general cooperative objects of the National Bureau. In line with the last named purpose, the department has evolved a procedure for arbitrating certain questions which arise among the companies when two or more of them are involved in the adjustment of particular types of claim situations.

Prior to the organization of the Claim Department of the Bureau, a large amount of inter-company litigation over matters of subrogation took place, much of it centering in New York City and the metropolitan area. This litigation was a hindrance to proper administration of company business, requiring the services of company attorneys, the production of witnesses in court, and all the delay and expense attendant upon resort to the courts. Still more important, such litigation interfered with cooperation and understanding among the companies and their representatives. They recognized that it was incompatible with their principles of friendly competition to carry these disputes to the courts, if it were feasible to handle them otherwise. But they lacked the machinery for keeping such disputes " in the family ".

In order to provide the machinery, the Bureau inaugurated, in April, 1929, an arbitration plan for New York and the surrounding territory which has since reduced to a large extent law suits between member companies. All companies subscribing to this plan bind themselves to arbitration in place of litigation in three kinds of situations.

The first situation named in the agreement covers " all collision subrogation claims involving amounts up to one thousand dollars ". Let us take an example. Automobile A collides with automobile B. The owner of automobile A is covered by collision insurance and collects damages on his collision policy from insurance company A. Owner A then subrogates to company A any liability claim he may have against owner B, who happens to be covered for property damage liability by company B. Assuming that company A's claim against owner B is for less than $1,000, companies A and B are bound by the agreement to arbitrate the former's claim against the latter.

The second situation covers " all questions of subrogation of compensation claims and medical expense borne by the compensa-

tion carrier". A hypothetical but typical case of this sort might arise where an employee of A, while delivering a package for his employer, is hurt on landlord B's premises, through circumstances which indicate negligence of landlord B. The employee elects to accept compensation, which is paid by insurance company A, to which is subrogated any claim which employee A may have against landlord B. The latter is protected by an owner's, landlord's and tenant's liability policy with company B. Again, if the claim and medical expenses involved are less than $1,000, companies A and B are bound to arbitrate.

Still a third kind of situation arises when a claim is brought against an assured where policies of two or more companies are involved and where there is a question as to which company shall undertake the immediate defense thereof. For instance, the owner of a building has owner's, landlord's and tenant's liability coverage with company A. He hires workmen to do a major job of alteration, and to cover any liability which might arise from the work he takes out a contractor's liability policy with company B. Somebody entering the building is injured under conditions which raise doubt as to whether the injury was due to the negligence of the owner as owner or as contractor. Such a case would fall within the province of the arbitration plan. *Arbitration in this instance would see to it that an assured, having proper coverage, got immediate service and was not shunted back and forth between carriers.*

While arbitration is mandatory only under the conditions which have been explained, the companies can and do voluntarily employ this good will method to settle many other claim disputes. The Arbitration Committee will hear and determine all matters which all parties to a controversy agree to submit to it for its consideration, regardless of whether the controversy arose in the New York area or elsewhere.

Under the terms of the agreement, the party asserting a claim shall file with the manager of the Claim Department of the Bureau a brief statement of the facts of the claim together with the amount. The opposing party, or parties, shall then be notified of the claim and requested to file a brief statement of its contention within 15 days. The case is then placed upon the calendar of the committee and a hearing held after all parties concerned have been notified of the date. The hearings take place at least once a month at the offices of the National Bureau in New York City.

The committee is selected from the counsel and claim department managers of the member companies at the annual meeting of the Bureau's Claim Department. A majority of the committee must sit at each meeting for decisions to be valid. A decision of the majority of those sitting is final and binding upon the parties to the controversy. No committee member, of course, is allowed to sit at a case in which his company is directly or indirectly interested.

Does this plan work? The companies think so. Here is the record: From the time the plan was set in operation in April, 1929, to December 1, 1936, a total of 634 cases were submitted for arbitration. Of these, 218 have actually been arbitrated. The other 416 have been settled amicably after submission, but prior to arbitration. Since the beginning not one company has withdrawn and in every instance the decision has been final and has been accepted unequivocally by the companies.

These figures show why the companies like the plan. It is effective, it saves them time and money, it promotes good feeling. It is a further demonstration of the principle of active good will which the companies recognize as requisite for the health of the business. Note that two-thirds of the cases submitted actually were settled before they reached a hearing. The moral there is that the intention to arbitrate is in itself conducive to voluntary settlement of a dispute. The great value of what we may call "the arbitrative attitude" is that it puts people in a frame of mind to agree rather than disagree. The casualty companies have learned that such a psychology is good business.

The insurance industry in all its branches—life, fire, casualty—is living, growing proof that good will works as a business proposition. Cooperative projects for making fair and uniform rates, for developing equitable rules and regulations, for aiding public improvement of conditions which affect the rates, are techniques of competitive good will among the companies. The give and take of arbitration, demanding not a pound of flesh but rather a reasonable settlement of a reasonable controversy, is an extension of that good will principle to the financial disputes which must inevitably arise among the companies. It is a principle which cannot help but reflect happily upon companies and public alike.

ARBITRATION OF MARINE CONTROVERSIES

BY

JOSEPH J. GLATZMAYER

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PROBABLY no line of commercial activity is attended with as much controversy and often times expensive and unnecessary litigation, as the conduct of marine operations; yet no business so readily lends itself to the determination of its controversies by arbitration.

Controversies within the industry, in the main, arise out of causes peculiar to and inherent in the conduct of marine operations, such as collisions, strandings, sinkings, fire and other perils to which vessels are subject.

Let us briefly review the usual method employed in determining issues arising out of the several recited causes, treating first with collisions and sinkings.

Two vessels come into collision and one or both suffer considerable damage or sink in consequence thereof. Assume that both vessels are insured against collision liability. It frequently happens that the underwriters covering each of the vessels are substantially the same. Now, what is the usual procedure? The crew of each of the vessels are interrogated by the admiralty attorneys of each of the respective owners or underwriters, if insured, or both. The investigation by the several attorneys, each independently of the other, is concluded and thereupon liability is denied on behalf of each vessel. In the event that both vessels are insured, the respective underwriters of each reimburse the owner of each of the vessels for the loss sustained.

Under the subrogation clause contained in the policies of marine insurance on each of the vessels, the respective underwriters instruct their admiralty attorneys to institute suit on behalf of each of the vessels to recover the amount of loss sustained by their assureds. If uninsured the owner proceeds in the same manner.

A libel is drawn setting forth the cause of action and filed in the Federal District Court against each vessel, alleging fault, such as errors of judgment or otherwise, and the issue is placed upon the calendar.

So much as to collisions and sinkings. The procedure is very much the same with relation to other damage sustained by a

vessel because of alleged negligence of an individual or corporation in providing an allegedly unsafe berth, an improper and negligent towing service or other circumstance giving rise to a cause of action.

Now let us consider stranding or fire. A vessel suffering either of these unfortunate casualties sends out a call for assistance. Other vessels respond and the vessel is floated from the strand or the fire is extinguished by one or more of such responding vessels. The assisting vessel or vessels, having successfully rendered service of a more or less meritorious character, rightfully claim salvage, the amount of which, irrespective of how determined, is arrived at by taking into consideration the danger to the stranded or burning vessel, the salved value thereof and cargo, if any, the risk involved in the performance of the service by the assisting vessel or vessels and personnel, as well as the value of the assisting vessels.

Owners of the assisting vessels, if more than one, are unable or make no effort to agree with the owner or underwriters, if any, of the assisted vessel on the amount of compensation to be paid. A libel is, therefore, filed against the assisted vessel and the legal procedure, already outlined, follows. The issue is placed upon the calendar and eventually is heard and an award, commensurate in the judgment of the Court with the value of the service rendered, is made. Because of congested Federal Court calendars, it has happened in the past and may again, that an issue is not tried for several years.

The foregoing mechanics are recited to illustrate the delay that must necessarily ensue in each case and which in many instances is responsible for important witnesses, for the most part seafaring men sailing the seven seas, not being available at the time of the trial, resulting in possible injustice to either one of the litigants.

If the claim be one for the recovery of damage, and the damaged vessel recovers, a reference is ordered to compute and determine the amount of recoverable damage, which again entails delay. When the amount of damage is determined, it is entered upon the docket of the Court as a final decree. The same action is taken where the Court makes an award for proven salvage service.

In any one of the proceedings cited, an appeal may be and is often taken to the Circuit Court of Appeals and, in some in-

stances, to the United States Supreme Court, a procedure which, no one will dispute, involves interminable delay, heavy legal expense, and an ever increasing interest charge.

In the light of what has been said, it would appear that arbitration provides a speedy, friendly and inexpensive adjudication of controversies arising out of marine operations, inasmuch as the issues may be heard by one or more arbitrators while all of the facts are fresh in the minds of the witnesses, who are still available.

Each party to the arbitration proceeding may select its own arbitrator, the two so chosen to select a third; or the parties may agree upon one arbitrator. All of the arbitrators should, and naturally would, be selected because of their experience and familiarity with marine matters.

The disputants may appear by counsel, but unlike a Court proceeding, arbitration is not subject to the hide-bound rules of evidence and witnesses testifying under oath are permitted to state the facts in their own way.

It is perhaps of interest to mention that the commercial marine salvage business is perhaps unique by reason of the fact that those engaged in it first render the service and subsequently fix the price to be paid. The largest and best equipped marine salvage company on the American seaboard conducts all such operations under a contract which provides that, in the event of failure to reach an amicable agreement as to the amount of compensation to be paid it for a successful salvage operation, its claim is automatically left to determination by arbitration by a designated individual or tribunal. It is worthy of note that such arbitrated claims by individuals or tribunals, well qualified by experience to determine the facts and pass judgment thereupon, have frequently been productive of awards in excess of $300,000.

Experience has time and again demonstrated that the presence of an arbitration clause in any agreement is an incentive to disputants to endeavor to reach an amicable agreement, thus making resort to arbitration of a controversy which, in the absence of the arbitration clause, would end in litigation, unnecessary.

One of the most potent and forceful arguments which can be advanced in favor of the arbitration of marine controversies is the fact that marine insurance rates are predicated upon loss experience, for which an assured, if the experience is bad, must eventually pay through the medium of increased rates. It is,

therefore, to the assured's interest to reduce the amount of each loss to the underwriter as much as possible. Since, of course, such loss includes legal expense and interest, this can be accomplished by arbitration.

Any owner interested in making every saving possible, especially one carrying his own insurance, would substantially reduce his loss ratio by arbitration.

Whether covered by insurance or not, arbitration of marine controversies would eliminate interminable delay, heavy legal expense, and the accumulation of interest attendant upon Court action.

The decision under an arbitration in States which have arbitration laws, of which there are a number, or under the United States Arbitration Act, is final, and may be entered upon the docket of the Court as its decision and judgment issue thereon, there being no appeal and no possibility of setting the decision aside unless fraud can be proven.

Those of the old school will probably argue that arbitration of marine controversies is impracticable and cannot be brought about. In the early days of Diesel engines, marine operators were skeptical, yet, today, more and more operators are installing this type of engine.

There is a constant evolution in every line of human endeavor and the marine business is no exception to the rule.

There are those who will condemn the suggestion of determining marine disputes by arbitration. To those I would say that by this method I have quickly and satisfactorily, and in a friendly manner, disposed of a number of controversies which otherwise would have been litigated.

We are all prone to condemn anything which savors of a deviation from old established custom, without trial, which exemplifies the old adage " Nothing risked, nothing gained ", and one might very properly add " Nothing learned."

It is almost certain that if arbitration is once generally introduced and adopted as a matter of business policy in the marine industry, its members will quickly fall in line and as a result of the experience gained, marine operators, to a large degree, will insist upon this method for the determination of claims and prevail upon underwriters to dispose likewise of claims arising out of the perils insured against, thereby effecting a substantial saving of both time and expense to all concerned.

ARBITRATION OF DISPUTES ON MEDICAL FEES

BY

LEON S. SENIOR

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THE New York Legislature in 1935 adopted several important amendments to Section 13 of the New York Workmen's Compensation Law designed to regulate the practice of medicine in connection with injuries suffered by workmen in the course of employment. Prior to the adoption of these amendments, several investigations were made by official and unofficial committees charged with a study of possible reforms in workmen's compensation, including correction of abuses that had developed in the field of medicine.

As an outgrowth of studies made by Industrial Commissioner Henry D. Sayer in 1922, and by his successor in office, Miss Frances Perkins, in 1929, Governor Roosevelt appointed a distinguished special committee composed of doctors and laymen under the chairmanship of Howard S. Cullman. This committee, after making an exhaustive investigation of the medical aspects relating to compensation, submitted to the Legislature, in 1932, a report which pointed to many serious medical abuses. Thereafter, Governor Lehman appointed a committee of ten eminent physicians representing the Academy of Medicine of New York and the Medical Society of the State of New York. This committee, of which Dr. Eugene H. Pool was chairman, made further inquiry into these abuses and submitted a report, including certain recommendations which were presented to the Legislature in 1934 and again in 1935. The amendments as finally adopted are based substantially on the recommendations in such report.

Without going into any great detail, it will suffice to sketch a rough picture of the conditions found and revealed by these several committees. The investigation has shown that the commercial spirit has entered very deeply into the medical practice affecting compensation. The ethics of the profession seem to have been discarded on many occasions by a class of practitioners interested in financial gain more than in the welfare of the patient. Clinics for treatment of compensation cases were found to have been organized on a commercial basis, soliciting business openly from employers and insurance carriers. While there were found

to be a few extremely good clinics, there were others which deserved condemnation as undesirable, lacking proper hygienic and sanitary equipment. It was charged that "lifting", *i. e.*, the transfer of a patient from one physician to another, or from one hospital to another without good cause, occurred quite frequently. It was said that claimants received either too many treatments or were returned to work before a complete cure had been effected. Either too many visits were ordered for the purpose of enlarging the medical bill, or insufficient treatment was given in the interest of economy. It was claimed that there existed cases of collusion between unscrupulous doctors and fraudulent claimants, supplemented by a willingness on the part of certain doctors to give expert testimony on either side for pay. It was alleged that rebating and fee splitting were not uncommon. Certain medical practitioners were charged with a lack of personal interest in the progress of their cases, permitting vicarious treatment by incompetent nurses and allowing physiotherapy treatments to go on indefinitely without visible results. Employers and insurance carriers were charged with exercising undue control over the medical situation because of their privilege to select the physician and hospital for rendering the requisite medical care. And the report concluded with a number of recommendations, the principal parts of which will be referred to in this article.

It is not my province to speak approvingly of the findings of Dr. Pool's committee nor to criticise the resulting law amendments. It is well to mention, however, that certain parts of the new statute are indisputably sound. One can heartily agree with the idea of regulating compensation clinics, which are now subject to inspection by the Medical Society and to license by the State. Equally commendable are provisions that aim to prohibit solicitation, rebates, fee splitting, and make "lifting" unprofitable. The efficacy of the amendments as a whole will be proven—as all things are—by the acid test of time and experience. It is important, however, to point out in this article the changes that have a special bearing on the arbitration problem:

1. *Free Choice of Physician.* The compensation law imposes upon the employer the obligation to provide medical and surgical care and treatment for the injured employee, including nurse, hospital service, medicine, crutches and apparatus, for the entire period that the nature of the injury and the process of recovery

may require. Ordinarily this obligation to provide and pay for medical care is assumed by the insurance carrier under the provisions of the policy contract, although there is an exception to this rule in the case of ex-medical policies issued to responsible employers who are qualified to assume the medical obligation without calling upon the aid of the insurance carrier. Generally speaking, however, the obligation to provide medical care is automatically transferred to the insurer. Under the law as it existed prior to 1935, the employer or the insurer was privileged to select the doctor or the hospital where the injured employee was to receive proper medical attention. The employee had no choice in the matter except in such cases where the employer had failed or refused to provide the necessary medical service. The law as now amended extends to the employee, with certain exceptions, the right to choose his own doctor or his own hospital, leaving to the employer the sole duty of paying the bill. In practice, the payment of medical bills rests with the insurer under its contractual obligation. The employee may waive his right of free choice. The right is also subject to exception in the event of emergency or where the injury occurs outside of the state, or where a high-priced specialist is wanted. The employer is given the right to transfer a case when he can demonstrate that the attending physician is rendering incompetent service.

2. *Qualification of Doctors.* The next important provision deals with the qualification of doctors to render service in compensation cases. A doctor may qualify by filing an application with the County Medical Society stating whether he is engaged in general practice or devoted to a specialty. The County Medical Society then places him in the proper classification, assigning to him a symbol which identifies his line of work. He is then recommended by the Medical Society for a license to be issued by the Industrial Commissioner qualifying him for his particular line of work in compensation practice. At the time of this writing approximately 14,000 practitioners have been qualified by their respective medical societies. Space does not permit further elaboration on this phase of the subject, but it may be well to note that in the event of unethical practice the doctor is given a hearing before the proper authorities and he may be deprived of his license for compensation work, if the charges against him are proven.

3. *Minimum Fee Schedule.* In order to protect the employer against excessive medical bills and also to protect the doctor against inadequate pay due to competitive conditions, the law now provides that a schedule of minimum fees shall be promulgated by the Industrial Commissioner on the recommendation of the State Medical Society and after a hearing to all interested parties. A minimum schedule of fees for the New York Metropolitan area was constructed in a conference comprising representatives from the State Medical Society, the insurance carriers and employers' organizations. The schedule was made the subject of conferences with the Industrial Commissioner and was approved by him on May 1, 1936. Physicians who are not specially licensed for compensation work are, under the provisions of the law, unable to collect their fees for services rendered. A decision to that effect by Justice Shientag has been affirmed by the Appellate Division, First Department, in the case of *Szold* v. *Outlet Embroidery Supply Company.* Furthermore, the physician may not charge less than provided for in the minimum fee schedule, but he can charge more if an agreement for higher fees has been made by him with the employer or the insurance carrier.

4. *Arbitration of Disputes on Medical Bills.* We now come to that part of the law which deals with the arbitration of disputes on medical bills. Under the law as it existed prior to July 1, 1935, Referees in the Labor Department and the Industrial Board had authority to settle only such disputes as involved cases where the employee engaged a doctor without authority from the employer. As previously pointed out, his right to choose his own doctor was limited to cases where the employer failed or refused to provide medical treatment. In all other cases involving disputes on compensation medical bills the doctor had his remedy by action in contract, mainly in the Municipal Courts, although in New York County considerable pioneering work by means of a voluntary arbitration system was carried on under the auspices of the National Bureau of Casualty and Surety Underwriters. This work probably gave birth to the idea for the creation of a statutory scheme on a state-wide basis. The new amendment contains a procedure for arbitration of disputes on medical bills which, although not sufficiently specific or definite, opens the door for an arrangement which it is hoped may prove to be workable. The groundwork for the procedure was prepared in conferences

with officials from the Labor Department and the American Arbitration Association and the details of administration have been perfected by the Compensation Insurance Rating Board acting in cooperation with the State Medical Society. The type of cases to come up for arbitration may be classified in two broad groups, viz., (1) where the fairness of the amount of the bill is questioned by the employer or the insurance carrier, and (2) where the case has been transferred to a second physician, the first claiming such transfer to be without good cause and demanding payment as if for a full course of treatment. The method of arbitration will be as follows: Each side to the controversy has the right to name two arbitrators who must be physicians and members of County Medical Societies. Each County Medical Society creates a panel from which arbitrators for the claimant physicians are selected. Employers and insurance carriers are likewise privileged to create panels from which physicians are selected as arbitrators. In any case where the four arbitrators, or a majority of them, cannot agree, they select a fifth doctor whose decision then becomes final. The Rating Board, representing the insurance carriers, has constructed a panel of doctors, appointing to that panel the best possible men, selected because of reputation for experience, good judgment and fairness. The statute provides an allowance of $10.00 per diem for each arbitrator. Each arbitrator will be expected to spend perhaps three hours on hearing days. Obviously this compensation is inadequate for busy professional men, but in appointing arbitrators the Medical Society, as well as the Rating Board, expects that the men selected will be actuated by a sense of duty rather than by a motive of profit. The fund from which arbitrators are paid will be in the hands of the Industrial Commissioner and consists of moneys paid by each party to the arbitration. Each litigant is required to pay 5 per cent of the award, subject to a minimum fee of $2.00. The expense of the administrative work to be carried on by the Rating Board will be assessed on the insurance carriers pro rata, depending on the number of cases each carrier may present for arbitration.

The calendar now in preparation comprises approximately 2,000 cases, all of which will be made the subject of preliminary examination. These cases will be reviewed by the Staff of the Rating Board, in conference with the insurance carriers, before

formal hearings are actually begun, with the object of reducing the accumulation to a practical figure. The hearings for the Metropolitan area will be held in the offices of the Rating Board specially equipped for that purpose. The preparation of the calendar, the maintenance of the necessary records and the notices to all interested parties will be under the supervision of the Rating Board cooperating with the State Medical Society. The forms in the arbitration procedure are comparatively simple. The insurance carrier files an " Objection " with the Industrial Commissioner, briefly stating the nature of the case and requesting an impartial examination of the medical bill, and sends copies to the doctor and the Medical Society. It is essential that the " Objection " shall be filed within 30 days after receipt of the bill. Failure to file within the required time is construed as a waiver and bars the carrier from questioning the value of the services rendered. With the " Objection " is sent a form of " Submission " to be signed and acknowledged by the parties whereby they agree to abide by the arbitration award. Upon receipt of these two forms, the Rating Board places the case on the calendar and notice of hearing is sent to all parties in interest. A Recording Clerk is present at the hearing. He administers the oath to the arbitrators, makes a short record of the proceeding, enters the award on a prescribed form which is then signed and acknowledged by the arbitrators, and sends copies of the award to both parties, to the Medical Society and to the Industrial Commissioner. There is no provision for a stenographic record. The amount awarded then becomes due and payable by the defendant, less a deduction for the fees payable to the Industrial Commissioner for the compensation of arbitrators.

It is anticipated that the questions to be raised will involve, *inter alia*, not only points relating to the fairness of the medical bill and its conformity to the fee schedule, but also as to the competency of the doctor and his disposition to follow ethical standards. It is not unlikely that the number of visits and the procedure followed may become items of inquiry by the arbitrators, who should be in a good position to judge the medical accounts rendered by their professional brethren. The observers of the proceedings, *i. e.*, the Medical Society and the Rating Board, should also be in a good position to form opinions on the attitude taken by the doctor, employer and insurance carrier in the hand-

ling of medical problems affecting compensation. This in itself may prove to be one of the important benefits resulting from the new amendments. Aside from that, it will put an end to troublesome litigation in the courts on disputes which can best be settled in a competent manner by technicians in a special field.

While this discussion has been limited to the arbitration of bills rendered by physicians, the program is sufficiently large in its concept to include also the settlement of disputes on hospital bills. The statute names hospital charges as a subject for arbitration. The administrative details for this branch remain to be worked out in the near future.

AMBASSADORS OF GOODWILL

THOMAS J. WATSON

AS THE Chairman of the Tenth Anniversary Committee of the American Arbitration Association and on the occasion of closing officially the Committee's activities, the American Arbitration Association, on December 3, presented Mr. Watson with the Medal of the Association given annually in recognition of outstanding achievement in the field of commercial peace. The presentation address made by Mrs. Vincent Astor, a member of the Board of Directors, and Mr. Watson's response, in part, follow:

BY MRS. ASTOR

Our guest of honor today is an outstanding ambassador of goodwill; and much of the great achievement now going forward is due to the pioneer work which he has been doing for many years.

As a trustee of the Carnegie Endowment for International Peace, as a founder and now President of the American National Committee of the International Chamber of Commerce, as Chairman of the Foreign Participation in the New York World's Fair and in many other capacities, he has served as such an ambassador to many other nations. His own business organization which encircles the globe is, under his leadership, a powerful agency for goodwill.

But he has also been our good friend and neighbor at home: A thinker himself, he has insisted that men think their way through life and has helped many on the path to good citizenship. A pioneer in generosity, rarely does a good cause come empty-handed away from his door. An adventurer in ideas, he has championed many causes given up by other men as lost.

And so quite naturally by inclination and tradition, he has come to champion arbitration and it has adopted him as its standard bearer.

Through his Chairmanship of the Tenth Anniversary Committee of our Association, the outposts of arbitration have been advanced at home and abroad; the level of goodwill has been immeasurably raised; and many of the dreams of the Association are coming true for greater service to mankind through commercial peace and for a more equitable administration of justice.

In presenting to you, Mr. Watson, the Association's Medal for Distinguished Service for Commercial Peace, I but inadequately express the tribute we would like to pay you for your great and generous service over the many years and particularly over the past year of our happy association together.

The Medal of our Association is an expression of our esteem and affection and a symbol of the goodwill and friendship which we foster. It is because

in deed you so truly exemplify the ideals and principles for which our Association stands, that I have especial pleasure in presenting to you this token of our respect for your achievements and of our gratitude for your particular service to arbitration.

By Mr. Watson

It is indeed a very great pleasure and honor for me to be with you today. I must say that I feel very much embarrassed in accepting a medal for participating in things that have always given me my greatest pleasure. However, Mrs. Astor, I accept this medal presented by you on behalf of the Association with my very deep appreciation and gratitude.

Arbitration is not something you can settle and complete in one conference. I think that explains why so many arbitration groups have not succeeded to a great degree. They expected to accomplish too much in too short a time.

The American Arbitration Association is something that must go on forever; there is always going to be work for it to do. And when we realize what we have accomplished here in our own country, it makes me feel that we can promote this idea of arbitration in a big way throughout the world, because there are other places in the world where they need it perhaps more than we do.

Modern wars are not settled on the battlefield; they are settled by arbitration after the battle. We should direct our thoughts toward trying to educate the peoples of the world to arbitrate before the battle, rather than afterwards, and I think it is possible to work out a plan of that kind.

Today the world is at the crossroad of fear and hope. A great many people fear that there is going to be a war. But the majority of the people, I believe, are hopeful that organizations such as our Arbitration Association, the Carnegie Endowment, the International Chamber of Commerce, the League of Nations—with all the faults charged against it—are going to work this out.

I think that is the great hope of the world, and we as individuals should contribute everything we can toward arbitration and cooperation.

I often recall what George Bernard Shaw once said: "We must all share in the evils of the world, or move to another planet."

As we think about that, we realize that we, as individuals, are a part of all that is wrong in this world, and it becomes our duty to do all that we can to help correct these evils.

I appreciate and enjoy my association with my friends in the American Arbitration Association as much as any other association that I have ever had in my life, and I want to continue to cooperate with you.

FAMOUS AWARDS

THE ALLEGHANY CASE

BY

ARTHUR A. BALLANTINE

Of Root, Clark, Buckner and Ballantine, Former Under Secretary of the U. S. Treasury

Hearings conducted last week before the American Arbitration Association as to whether trades in the "when issued" $2.50 prior preferred convertible stock of the Alleghany Corporation are valid or not, see a new high mark in culture. There was none of the usual shouting and screaming by opposing counsel and attendant hammering from the bench. Instead the whole affair was conducted in a spirit of sportsmanship and voices were never raised. In fact, opposing attorneys sat as they advanced their arguments instead of marching around wild-eyed and indulging in histrionic rhetoric. In short, the forensic display was not there. And had it been there is little doubt that the arbitrators would have made short work of stifling the effort. The whole business was thoroughly business-like and carried the inescapable impression that justice was in its true majesty. Had the matter been before the ordinary courts it is not unlikely that the argument, *pro* and *con*, would still be in formative stage.

THIS statement, from the financial page of the *New York Herald-Tribune* of September 8, 1935, concerns one of the most complex matters ever submitted to the American Arbitration Tribunal, in which some $500,000 were involved and to which more than 30 members of the New York Stock Exchange were parties.

The case presented a novel question as to "when, as and if" transactions in securities. It was decided on the basis of what was believed to be commercial usage and the reasonable expectation of parties to such transactions.

The controversy arose as follows: The Alleghany Corporation defaulted in interest on a bond issue and on March 15, 1934, announced a plan of reorganization lowering the interest rate on the bonds and offering, in exchange for certain coupons, a new issue of prior preferred stock. The plan was to be declared operative by the corporation when in its judgment sufficient bonds had accepted. The plan made no provision for being carried out through judicial proceedings, and provided that unless declared operative by November 30, 1934, deposited bonds were to be

returned. This issue was traded in immediately on a " when, as and if issued " basis.

Shortly thereafter Congress enacted Section 77B of the Bankruptcy Act which permitted a court to make binding on all creditors a plan accepted by two-thirds of each class affected. On November 28, 1934, the directors of Alleghany Corporation declared the plan operative, subject to confirmation in proceedings under that act, and the reorganization plan was subsequently put through under that law. Before the plan was carried out, the market price of the stock fell materially so that the " when, as and if " purchasers would sustain loss by carrying out the transactions.

Upon completion of the reorganization and the issuance of the stock, the question arose as to whether purchasers were obligated to accept their commitments in stock issued under the Section 77B reorganization or whether, having agreed to purchase it under the orginal plan, they were now free to decline to accept and pay for the stock as issued.

So troublesome did the controversy become and so pressing the need for its prompt determination that, in an effort to settle it expeditiously, the Association of Stock Exchange Firms appointed a special committee to act for the Association in the matter, without compensation.

On April 27, 1935, the committee addressed the firms disputing the validity of the transactions, suggesting arbitration before a disinterested and impartial body and inviting their acceptance. On June 10, having received consents from over 95 per cent of the houses involved, the committee proceeded with arrangements for the arbitration, under the Rules of the American Arbitration Association. A hearing was arranged for September 5, 1935, with a second session, called by the arbitrators for the purpose of obtaining additional information, on October 2.

The arbitrators' award was delivered on October 11, 1935, and held that the " when, as and if " transactions were binding and that the purchasers were obliged to take up the stock. It was accompanied by a careful opinion, examining each of the contentions made on behalf of the purchasers, and setting forth the arbitrators' reasons for concluding that the objections urged were not valid.

The cost of the actual arbitration proceeding, including stenographic transcripts of the testimony but not counsel fees, was approximately $600, or slightly less than $18 to each party involved.

The Board of Arbitrators chosen from the Association's Panel and representing, respectively, the general business, the financial and the legal viewpoints, were: Thomas H. McInnerney, President of National Dairy Products Corporation; Richard Whitney, former President of the New York Stock Exchange, and the writer, all of course serving without compensation. The attorneys representing the parties were: Oppenheimer, Haiblum & Kupfer, for the sellers, and Gilman & Unger, for the purchasers.

INTER-AMERICAN COMMERCIAL ARBITRATION AND GOODWILL

MESSAGE

FROM

DR. ANTONIO S. DE BUSTAMANTE Y SIRVEN

THE TASK of developing and spreading the idea of Commercial Arbitration throughout the whole of America by an Inter-American Commission is at once a noble one and pregnant with possibilities.

The advantage that this procedure has over legal contention is manifest. In the first place, it renders the solution of commercial disputes, usually delayed by the complexity of the matters involved and the processes of the law courts, more rapid. In the second place, and as a consequence of the foregoing circumstances, it must result less costly. Thirdly, it permits a liberal application of the rules and principles of equity, which mitigate the extreme and, at times, partly unjust, rigour of the law—a thing that is habitually denied to Justices on the Bench. And, lastly, it stimulates and favors a sentiment of inter-American solidarity and facility in trading between the 21 republics of the New World, already well convinced of the desirability of tightening their economic connections under a policy of peace, equality and justice.

A difficulty that has arisen in practice and which, perhaps, has retarded the introduction, spread and success of the campaign in favor of inter-American commercial arbitration has been the impossibility of enforcing compliance with arbitral awards outside of the country in which they were given. But that obstacle has been in great part overcome. In fact, Article 432 of the Code of International Private Law, approved in the Sixth Pan American Conference of 1928, and therein officially named "The Bustamante Code", in its Article 432, forming part of the chapter devoted to the "Execution of Foreign Judgments" provides that "the procedure and the effects regulated in the preceding articles shall be applied in the contracting states to awards made in any of them by arbitrators or friendly compositors, whenever

the case to which they refer can be the subject of compromise in accordance with the legislation of the country where the execution is requested". This last condition is fulfilled in all the states of America, because it deals with private interests of a commercial nature; and the Code cited already is in force, as expressly adopted legislation, in 15 American republics that contain a population of more than 70 million inhabitants.

The principal material obstacle, then, is practically surmounted, and the American people—thanks to the intense propaganda being conducted—can soon have the satisfaction of having, before Europe, this new benefit, in theory and practice: that of inter-American commercial arbitration. The merchants and the jurists of the New World should give it their most wholehearted support.

MESSAGE

FROM

DR. L. S. ROWE

Director General of the Pan American Union

THE DECISION of the American Arbitration Association to publish a journal will be hailed by everyone interested in this important movement. We have hardly begun to realize the extent to which this simple and effective procedure for the settlement of commercial disputes removes one of the fruitful sources of international irritation and thus contributes toward good feeling between nations.

In order that commercial arbitration may secure the broader acceptance which it deserves, it is evident that it will be necessary to conduct an intensive educational campaign both in this country and abroad. In the countries of Latin America such campaign will be productive of far-reaching results because it is clear that the widest possible application of the principle of commercial arbitration on the American Continent will serve to strengthen the bonds of friendship between the nations of America.

The subject of commercial arbitration has been considered by recent International Conferences of American States, as well as by the several Pan American Commercial Conferences. As a result, the Inter-American Commercial Arbitration Commission

has been created, and is now engaged in developing a definite procedure for the arbitral settlement of differences that may arise in inter-American commerce.

The publication of a journal such as that contemplated by the American Arbitration Association will be of real value in aiding the work of the Inter-American Commercial Arbitration Commission and in promoting the principle of commercial arbitration in general. The Association is to be congratulated on this additional service which it is performing in furtherance of a great cause.

THE MAGIC CARPET OF PEACE

BY

HON. SPRUILLE BRADEN

Ambassador of the United States, Chairman, Inter-American Commercial Arbitration Commission

FOR OVER 100 years the pacific mills of the western hemisphere have been weaving a magic carpet of peace. It is the work of three Americas and 21 nations. The carpet is now being unrolled for a war-weary world to see. It is to carry men of different Republics among each other in the pursuit of commerce without danger of bitter litigation; it is to provide states with a consultative system by which war may be avoided.

This magic carpet, whose harmonious pattern was so vividly developed by the President of the United States at the Conference at Buenos Aires in December, 1936, is not a product of a moment nor even of a few years. On the contrary, so far it has been a century in the making and is of a complicated design and of many colors. Its weaving began in 1822 with the bilateral agreement for general arbitration between Colombia and Peru. These two countries have been not only pioneers but have reinforced their first venture by other general arbitration treaties.

During the century 78 arbitration agreements have been entered into among American states to settle controversial boundary or financial claims. Embodied in the constitutions of several republics are provisions that war shall not be declared until arbitration or other pacific means have been tried and failed. Concurrent with this achievement there has been constant education in the art of peace.

Wars are not causes but effects, and behind most wars lies a social causation, which frequently is of financial or commercial origin. In these intimate economic relations misunderstandings, misconstruction of terms, words better left unsaid, are sufficient to undermine the confidence and goodwill so necessary to the maintenance of friendly commerce. Through the very tension of competition, the diversity of languages and the complexity of laws and usages, goodwill may be unwittingly transformed into bad will.

Also, it is a well recognized fact that unreasonable or harsh trade barriers which impede commerce in a hemisphere drawn close together by other ties, give rise to bitterness and misunderstanding, and in proportion as these are eliminated and adjustments concluded, profitable trade increases. As such trade expands, contracts increase and the necessity becomes evident for continuing the fostering and safeguarding of the goodwill inspired by razed trade barriers and the increase in commerce.

It is apparent that for states to insure themselves against war after grievances arise is not enough; it is curative, not preventative. Moreover, it is a costly proceeding even though it be a pacific adjustment. Not only must states agree to reduce trade barriers but also they should create some continuing means for maintaining evenly alive the flow of goodwill released by this action. A further preventative step is needed to make sure that commercial and economic disagreements do not reach the stage where they may lead to grave consequences, even war, or where they threaten to restore the old trade barriers.

In the last analysis it may well be that the peace of two countries hangs on the thread of the written contract which governs the flow of commerce between them. Every such contract is a carrier of goodwill so long as it is drawn in confidence and good faith; every such contract is a carrier of illwill and potential war so long as any controversy arising under it is not quickly settled. But contracts drawn in the best of faith may be differently interpreted. Among people of the same nation and language these matters are often not easily settled as the body of contract law well proves. But inject into a similar case of divergent interpretation in international trade, different languages, different currencies, different social usages, fundamental differences of legal structure and the inevitable atavistic mistrust of

the stranger, and the varying interpretation of a contractual clause may be compounded into a national hate. Let such a situation, even though small perhaps, continue without making an effort to clear it up and it will rankle and lead to consequences of untold damage in prestige, opportunity and perhaps lives.

No group of men has more keenly recognized this danger than the delegates to the various Pan American Peace Conferences. They, too, have had a hand in weaving the magic carpet in their endeavor to strengthen commercial peace. Practically every conference that has met since 1915 has had this subject in mind, has discussed it and started education looking toward the minimizing of commercial controversies. After 20 years of discussion and experiment, the Seventh International Conference of American States, meeting in Montevideo in 1933, wove into the pattern of this magic carpet of peace the economic strands which give it strength and solidity and a certain lustre of their own.

What was destined to become a wide-flung inter-American system of commercial peace had a very simple beginning in a resolution adopted at the Montevideo Conference. It said:

> That with a view to establishing even closer relations among the Commercial Associations of the Americas, entirely independent of official control, an Inter-American Commercial Agency be appointed in order to represent the commercial interests of all Republics, and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration.

Under this resolution, and under the auspices of the Pan American Union, there has been organized an Inter-American Commercial Arbitration Commission, the members of which are chosen from all of the Republics.[1] Its first duty is to set up arbitral machinery with an administrative committee in each republic, so that any inter-American commercial controversy can be immediately resolved. The machinery is as nearly uniform as possible, with standard rules, government facilities granted in each republic, standing panels of arbitrators and a competent administration to facilitate the functions of the arbitrators.

But this system now in process of organization is something much more than machinery for arbitration. It provides a meeting ground for men from all of the republics to seek uniformity in commercial and arbitration law and to change the laws that

[1] The April issue will contain an account of this system.

now obstruct either the free flow of goodwill or of commerce. It provides the opportunity for carrying on educational work in each country so men may know what arbitration is and can do in periods of strain, and thus knowing turn from force as a tool.

And yet the Commission is much more than an agency for arbitration: it is a symbol of the spirit of cooperation which has grown for a century carried down into the practical everyday profit and loss activities of daily life; it is the concretization of an ideal; it is the embodiment of the aspirations of the people of the western hemisphere to apply the peace structure to its economic as well as political life. It demonstrates the truth that if it is necessary for governments to consult when they are menaced by war, it is also necessary that men of different nations consult when they are menaced by litigation. Destroy the small monster before it can grow into a big one.

The recently concluded Inter-American Conference for the Maintenance of Peace was a great success because all the delegates were individually and collectively determined that it should be so. They all profoundly appreciated the responsibility which rested upon them and their work was inspired by the opportunity of meeting and seeing in person the President of the United States of America, whose visit they regarded not merely as a maximum of courtesy but as an event of the greatest moment and encouragement for this entire hemisphere. If this Conference had accomplished nothing else than to bring these many personalities into intimate contact and to accommodate their different viewpoints it would have been more than justified. However, 69 acts were resolved upon, several of which, such as the Convention to Coordinate Existing Treaties Between American States, the Convention for the Maintenance, Preservation and Reestablishment of Peace, etc., establishing some new and reenforcing old measures, to make more effective the peace machinery of this hemisphere. The extraordinary unanimity of opinion which existed was strikingly demonstrated by the fact that the most important of these projects were presented for the consideration of the Conference, not by one state alone but jointly by all the 21 republics. To my knowledge never has such a complete unity of opinion been shown at any previous international conference.

To those privileged to be present at the Inter-American Conference for the Maintenance of Peace, it was apparent that inter-

American relations were coordinated in highly dramatic political aspects, and that underneath ran a current of commercial goodwill that augured well for the solidity of the whole structure.

COMMERCIAL ARBITRATION IN ARGENTINA

BY

DR. TOMÁS AMADEO

President, Chamber of Commerce of Argentina; Chairman Argentine Committee of the Inter-American Commercial Arbitration Commission

IN THE Argentine Republic the question of the general application of the practice of commercial arbitration presents certain aspects characteristic of a problem which, in reality, exists no more in the United States and in the majority of European countries.

The Argentine population, apart from its traditional foundation, inherited from the Spanish colonists, is a mixture of various elements, originating indirectly or directly from a variety of European countries.

Aside from this, it may be said that immigration to Argentina has been, until very recent times, entirely spontaneous and without limitations; so that, although the immigrants were of a superior physical quality and of an enterprising spirit, the result is not that achieved by the United States of America and especially by Canada, to which a clever system of propaganda attracted a selected body of immigrants.

To these latter countries came large contingents of immigrants who were relatively qualified in their own lines, with a certain culture and in many instances with some capital, however little it may have been. Also, from the ethical aspect, these immigrants were principally of Anglo-Saxon origin.

In Argentina a large number of immigrants arrived in the country completely without resources and the proportion of illiterates was considerable. These circumstances, together with the diversity of racial origin, language and faith, have necessitated on the part of Argentine authorities and private institutions a serious cultural effort, stronger than in the United States or in Canada, in order to maintain a high social standard, achieve the assimilation of the immigrants and raise the cultural level.

These efforts have progressed greatly but they need to be continued at least for a number of years, taking advantage of the present small inflow of immigration, to accelerate this work among the population of Argentina of today.

These circumstances have undoubtedly been of influence in developing the nature of persons devoted to commercial activities. Obviously I do not refer to those outstanding men, of whom there are many in Argentine commerce, but to the general run of merchants and manufacturers who make commerce and industry.

Our merchants, for the above reasons and because of the very nature of their work, are individualists, or at least, have individualistic tendencies. Added to this is the complication of the competition of foreign interests and the relatively large international contingent in major and minor aspects of Argentine commerce.

Such are the circumstances which have made difficult up to the present time in the commercial development of Argentina, the development of the spirit and practice of professional solidarity among merchants, which appears in the slow, sometimes difficult development of organizations such as the Argentine Chamber of Commerce which recently in the past years has been able to reach a high grade of efficiency.

In order that institutions such as arbitration may be able to grow and prosper it is without doubt necessary to have a background of moral solidarity, education and high standards.

However, it is not just to exaggerate, and it should not be imagined from the above that the Argentine merchant is constitutionally opposed to a rapid improvement of the conditions described.

Our country is a real leader in political arbitration and has been, I believe, the first country in the world to sign with another country a treaty of absolute and obligatory arbitration. This augurs well for the future of commercial arbitration, since the general conception of arbitration is accepted in the popular consciousness.

For this reason I am optimistic enough to believe that in a short time, through educational work, it will prove possible to develop among business men a complete and definitely favorable sentiment toward the idea and practice of commercial arbitration, national as well as international.

This will be the first and foremost duty of the Argentine National Committee of the Inter-American Commercial Arbitration Commission, which has just been organized in Buenos Aires, following the suggestion of the distinguished Ambassador of the United States to the Chaco Peace Conference, Hon. Spruille Braden, and under the auspices and by action of the Argentine Chamber of Commerce, of which I have the honor to be President.

It is my privilege to have been honored with the Chairmanship of the Argentine National Committee. Our work begins under excellent auspices in an optimistic surrounding of American solidarity, inspired by the meeting, in Buenos Aires, of the Inter-American Conference for the Maintenance of Peace, and above all by the memorable visit of President Roosevelt, whose brief visit to Buenos Aires was like the bright flight of a meteor.

The qualifications of the members of the National Committee give a guarantee of their effectiveness. All are prominent through their achievements or the high positions which they hold today. Among them are three National Ministers, of Agriculture, of Finance and of the Interior, the Presidents of the Rural Society of Argentina, of the National Bank of Argentina, of The Argentine Industrial Union and of the Central Bank, to name only a few of them. The authorities have accepted with the best wishes their initiative, which also has called forth the applause and repeated enthusiastic commentary of the Argentine press, which is one among those of the highest standing in the world.

The same merchants, or at least those who represent what may be called the elite of the profession, show a favorable tendency and this adds greatly to our hopes.

However, there is much work to be done, hard and persistent work of a great variety, eminently of an educational nature. What I have said with reference to Argentina may possibly apply to other Latin-American countries whose psychology, social foundation and commercial activity are similar to ours and differ perhaps only in size and extent.

By united work, always in close cooperation, who knows, perhaps we may find the magic formula to obtain a rapid result in the worthy and high aims we are following.

NOTES AND COMMENT

AMERICAN BUSINESS SUPPORTS GOOD NEIGHBOR POLICY. American exporters and importers are supporting the good neighbor

policy of the United States in Latin American Republics. That they realize the importance of clearing trade channels of controversies as a step in this direction is indicated by the action taken at two foreign trade conferences. The 16th Middle West Foreign Trade and Merchant Marine Conference, which met in Cleveland on October 26 and 27, 1936, resolved that:

> Pursuant to the recent creation of the Inter-American Commercial Arbitration Commission, authorized by Resolution 41 of the Seventh International Conference of American States, the convention urges that all foreign traders avail themselves of the facilities and services offered by the Commission and its local branches in each of the American Republics, and include in their foreign trade contracts the standard arbitration clause which the Commission recommends.

At the 23rd National Foreign Trade Convention, meeting in Chicago, on November 18-20, a similar resolution was adopted, reading as follows:

> The Convention urges that Latin American traders avail themselves of the facilities offered by the Inter-American Commercial Arbitration Commission and its local branches in each of the American Republics and that they include in foreign trade contracts the standard arbitration clause which the Commission recommends.

In order to encourage business men to take immediate action in this direction, Mr. Herman G. Brock, Acting Chairman of the Inter-American Commercial Arbitration Commission in the absence of its Chairman, Hon. Spruille Braden in the Argentine, made the following offer, through the medium of the 23rd National Foreign Trade Conference:

> At this time, when the Conference for the Maintenance of Peace is about to open in Buenos Aires, it would seem timely for American business to make a gesture of goodwill in eliminating pending commercial misunderstandings and controversies. The Inter-American Commercial Arbitration Commission is ready to contribute its services toward this gesture and, as its Acting Chairman, I have pleasure in making the following offer: From this date, until the end of 1937, the Commission will accept from any exporter or importer who wishes to try arbitration, one case free of charge.
>
> This offer will be forwarded to the executives of all foreign trade organizations in the country, with the request that the membership of such organizations be notified.

PAN AMERICAN SOCIETY HONORS ARBITRATION COMMISSION FROM ECUADOR AND PERU. An example of international good will and of constructive effort for the maintenance of peace was set by the Ecuador-Peru boundary negotiations whose opening session

was held at the White House on September 30, 1936. In welcoming the delegates President Roosevelt commented on this friendly and conciliatory spirit in the following words:

> These two great republics throughout the course of the long discussion of their boundary controversy, have never faltered in their determination to settle this boundary question by pacific means.

Recognition was given to this spirit of conciliation at a luncheon, tendered in New York by the Pan American Society, Inc., on September 12, 1936 in honor of the Arbitration Commissions from Ecuador and Peru and attended by over 100 distinguished guests. Mr. John L. Merrill, President of the Society, presided on this occasion and complimented the delegates on their sincere desire to settle the pending boundary dispute by arbitration. A message from Secretary of State, Cordell Hull, sent to Mr. Merrill on this occasion reads in part as follows:

> It is particularly fitting at a time when the American Republics are preparing to meet in conference to study and to act upon a program for the maintenance of peace in the Western Hemisphere that the governments of Peru and Ecuador should give this clear proof of their desire for and their faith in the pacific settlement of controversies. The good will and the will for peace which are so plainly manifested by those two enlightened peoples augur well for the success of the negotiations which are to be initiated in Washington on September 30. The definitive settlement of all questions at issue between the governments of Ecuador and Peru regarding their boundary will be a powerful factor in support of peace in the American continents. I anticipate the pleasure of personally greeting in Washington all of the distinguished members of the Delegations of Peru and Ecuador to whose wise and able guidance this great work of peace is to be entrusted.

UNITED STATES COMMITTEE OF THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION. Each American Republic is to have a National Committee under the Inter-American Commercial Arbitration Commission, whose functions are to maintain Panels of Arbitrators, administer arbitration proceedings, facilitate the use of arbitration and to carry on educational work.

In accordance with this plan the United States Committee has completed its organization under the chairmanship of James S. Carson. It has 88 members located in 36 cities, and a Panel of 192 arbitrators.

It announces the method of submitting a controversy for arbitration in the United States to be as follows: The party desiring arbitration writes the headquarters of the Commission at 521

Fifth Avenue, advising the nature of the controversy, the amount of the claim, the name and address of the opposing party and stating whether or not the opposing party has agreed to submit to arbitration. If no agreement has been reached between the parties, the Commission will, first of all, endeavor to obtain the consent of the opposing party to submit to arbitration. It has been found that the intervention of a neutral agency is frequently successful where the parties to the controversy themselves are unable to agree on arbitration. When the consent of both parties is obtained, a formal agreement to arbitrate is signed and arrangements for the hearing proceed under the Rules of the Commission and before members of its Panel.

ARGENTINE COMMITTEE. On the sixth of November 1936 the Argentine National Committee of the Inter-American Commercial Arbitration Commission held its formal organization meeting. The committee will cooperate closely with the Chamber of Commerce of Argentina, under whose auspices it was organized. The President of the Chamber, Dr. Tomás Amadeo is Chairman of the Committee and the following constitute its membership:

Dr. Ernesto Aguirre, President of the Bolsa de Comercio; Dr. Ricardo Aldao, Attorney; Dr. Juan Bayetto, Dean of the Faculty of Economic Sciences of the University of Buenos Aires; Dr. Ernesto Bosch, President of the Banco Central; Dr. Miguel A. Cárcano, former Minister of Agriculture; Dr. Angel M. Casares, former Minister of Argentina to Belgium and former Dean of the Faculty of Law of the University of La Plata; Dr. Ramón S. Castillo, Minister of Interior, Professor of Commercial Law at the University of Buenos Aires and Vice President of the Inter-American Commercial Arbitration Commission; Dr. Fernando Cermesoni, Judge; Sr. Luis Colombo, President of the Argentine Industrial Union; Dr. Cupertino Del Campo, President of the Argentine-North American Cultural Institute; Sr. Luis Fiore, Engineer, Member of the Inter-American Commercial Arbitration Commission, member of Board of Directors of the Chamber of Commerce of Argentina; Dr. Divico A. Fürnkorn, Doctor of Economics and under-Secretary of the Ministry of Exterior and of Culture; Dr. Enrique Gil, Attorney, University Professor and member of the Inter-American Commercial Arbitration Commission; Dr. Arturo Gutiérrez Moreno, President of the Argentine-

Brazilian Chamber of Commerce; Dr. Cosme Massini Ezcurra, President of the Sociedad Rural Argentina; Dr. Roberto M. Ortiz, Minister of Finance; Dr. Enrique S. Pérez, former Minister of Finance, President of the Banco Hipotecario Nacional; Sr. Leo D. Welch, President of the North American Chamber of Commerce and Dr. Luis Maria Zambrano, Attorney.

ARBITRATION LEGISLATION IN COLOMBIA. The Republic of Colombia is bringing its arbitration law into harmony with the standards of arbitration approved by the Seventh International Conference of American States and in so doing is taking an important step toward the preservation of commercial peace.

A bill amending the present arbitration law was submitted to the Colombian Senate by Senators Juan Samper Sordo (member of the Inter-American Commercial Arbitration Commission) and Manuel F. Caamano and has been reported favorably.

It provides for the recognition of the validity of an arbitration clause in commercial contracts and permits parties to submit their controversies either to a chamber of commerce or other national or international organization, or to incidental arbitrators selected by themselves. Provisions are made for the appointment of arbitrators on behalf of a dilatory party, either by the organization conducting the arbitration, or by the court having jurisdiction. There is no appeal from the awards of arbitrators and they have the force of a court judgment.

NOBEL PEACE PRIZE TO DR. CARLOS SAAVEDRA LAMAS. When Dr. Saavedra Lamas introduced Resolution 41 on commercial arbitration to the Seventh International Conference of American States meeting at Montevideo in December, 1933, he became indirectly the founder of the Inter-American Commercial Arbitration Commission. The Commission, as one of the collaborating organizations in the publication of THE ARBITRATION JOURNAL, takes, therefore, this opportunity to express its gratification that the Nobel Peace Prize of 1936 was awarded to Dr. Saavedra Lamas, distinguished exponent of all aspects of arbitration, political, commercial and industrial.

LATIN AMERICAN COMMITTEE OF NEW YORK WORLDS FAIR. The committee on foreign participation of the New York Worlds Fair

has appointed a sub-committee on Latin America of which James S. Carson is chairman and the following are members:

Hon. Edward F. Feely, International Nickel Co., Inc.; Captain J. W. Flanagan, President, Andean National Corporation, Ltd.; Daniel A. Del Rio, Vice President, Central Hanover Bank & Trust Co.; Berent Friele, President, American Coffee Corporation; Robert de Forest Boomer, of Noel, Berman & Langley; Bernhard K. Schaefer, President, Schaefer Klaussman Co., Inc.; Frederick E. Hasler, Chairman, Executive Committee, The Continental Bank & Trust Co.; Paul W. Alexander, President, Wessel Duval & Co.; Phanor J. Eder, Hardin, Hess & Eder; Major R. W. Hebard, President, R. W. Hebard & Co., Inc.; Charles H. C. Pearsall, President, Colombian Steamship Co., Inc.; Jerome S. Hess, Hardin Hess & Eder; Lt. Col. A. Kenny C. Palmer, Director, Chile-American Association; David E. Grant, Pan American Airways; Dr. Roscoe E. Hill, Chief, The National Archives.

This committee, whose members are all experts on one or more Latin American countries, will consider a fitting inter-American participation in the Worlds Fair activities of which inter-American arbitration may be a part.

ARBITRATION AFFAIRS

FOREIGN

RADIO TELEGRAPH. In a general convention and under general regulations between the United States and other powers, signed at Washington in 1927, there occurs an interesting use of compulsory arbitration in the radio-telegraph.

Article 20 provides that in case of disagreement between the two contracting governments regarding the interpretation or execution of the present convention or of the regulations the question shall, at the request of one of the governments, be submitted to arbitration. For that purpose each of the governments involved shall choose another government not interested in the question at issue. If agreement between these two arbitrators cannot be reached, the latter shall appoint another contracting government equally disinterested in the question at issue. If the arbitrators cannot agree upon the government, each proposes a government and lots shall be drawn between the governments proposed. The drawing devolves upon the government within whose territory the International Bureau of the Telegraph Union is located. The decision shall be by a majority vote. This provision may afford a precedent for the amicable settlement and maintenance of cable rates.

COMMERCIAL ARBITRATION AT THE PARIS CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION, 1936. To foster and unify commercial arbitration all over the world has always been one of the chief aims of the International Law Association from its inception. The Association appointed a special Arbitration Committee [1] to study the problem and make proposals for unification. A resolution was passed in 1930 at the New York Conference of the International Law Association to the effect that to protect the security of international commerce, agreements between governments should be entered into to regulate the essentials of arbi-

[1] At present, the Committee consists of the following members: Fraser, R. S. (Chairman); Baxter, H. J.; Davies, W. Arthian; Fraenckel, Wilhelm; Govare, J. P.; Grey, F. T.; Raffenburg, M.; Witenberg, J. C.; Colombos, J. C. (Convener).

tration practice and procedure between nationals and the respective countries and to provide for reciprocal enforcement of commercial arbitration agreements and awards.

A decisive step in this direction, it will be recalled, had already been taken in 1923 by the adoption of the Protocol on Arbitration Clauses and the subsequent Geneva Convention of 1927 for the enforcement of foreign awards. The United States, it is true, has not signed or ratified either of these two international conventions but a great number of countries have already ratified both conventions.[2] Moreover, the conclusions reached at the Montevideo Conference of the American Republics in 1933 also provided a basis for uniform standards for the arbitration laws of the various American Republics.

The report of the Arbitration Committee for the 1936 Conference of the International Law Association builds upon these developments in its endeavor further to unify international and commercial arbitration. In the committee's report for the Budapest Conference in 1934, it had already been recognized that the setting up of a special Tribunal of the International Law Association for arbitration purposes would not be recommendable in view of the existence of the Arbitration Court of the International Chamber of Commerce. A resolution adopted at Budapest stated that the Association should take into consideration the experience already acquired by the various expert bodies in other countries, such as the London Institute of Arbitrators and the American Arbitration Association.

The 1936 Report emphasizes the complicated questions of law which invariably come up since the substantive laws of the various countries are built upon fundamentally different legal concepts. It laid stress, however, upon what had already been accomplished by the International Chamber of Commerce and the American Arbitration Association and their efforts toward a uniform system of arbitration. Particular importance is attached to the fact that, in addition to the efforts of such associations, the commercial community now acknowledges the right of the contracting parties to choose for themselves the terms of the contract and to vary the prescribed forms of contracts placed before them for signature.

[2] A complete and up-to-date list is to be found in Mr. R. S. Fraser's article on international commercial arbitration in Kimes' International Law Directory, 1936.

The London Court of Arbitration has long been advocating the addition of the following clause to avoid difficulties due to conflict of laws:

> The construction, performance and validity of this contract shall be regulated by the law of (follows the name of the country selected).

In the concluding paragraph, the Report again stresses that existing organizations should cooperate with the object of reaching unification, both with regard to the rules of arbitration and the reciprocal enforcement of awards.

> Towards the attainment of this object, your Committee consider that the various branches of the I. L. A. should be invited to contribute Reports of the practice obtaining in their respective countries in commercial arbitration. It will then be the task of your Committee to advise, in the light of such Reports, to what extent unification may be practicable in the near future.

It is well to recall in this connection that the Rome Institute for the Unification of the Private Law, as early as 1932, made an attempt to draw up a uniform arbitration law for all countries. Professor David, in that year, published his "Rapport sur l'arbitrage conventionnel en droit privé",[3] which served as a basis for the meeting of the Arbitration Committee of the Institute in 1933. The committee, under the chairmanship of M. d'Amelio, First President of the Italian Court of Cassation, published, in 1935, a draft Uniform Law on Arbitration which was then submitted to the countries which are members of the League of Nations. This interesting report has meanwhile been withdrawn for revision but it undoubtedly is evidence of the ever-recurring endeavors to unify international commercial arbitration even beyond the limits of the international agreements of 1923 and 1927 which concerned only reciprocal recognition of arbitration clauses and enforcement of awards.

According to the 1936 Report, the Arbitration Committee of the International Law Association will have as its chief aim the further study of the question to what extent a unification of the entire arbitration law, such as suggested by the Uniform Arbitration Law draft of the Rome Institute can be achieved.

THE INSTITUTE OF ARBITRATORS. Early in 1915 the Institute of Arbitrators was formed by a small body of professional men in

[3] U. D. P. Etudes III S. D. N. 1932-C. D. 1932 290 pp.

London, with a view to assisting the community to promote and facilitate the practice of the settlement of disputes by arbitration. Its members are mainly engaged in their primary occupations in the chief professions.

The Institute holds examinations twice a year and considerable value is placed on the oral examination.

By the holding of Practice Arbitrations, Lectures and Discussions, it educates and trains the students to become arbitrators. Its Panel enables the right arbitrator to be selected for any dispute which may arise and arbitrations held under its own aegis are conducted under a fixed schedule of fees. It has published a Handbook on Procedure and Evidence, which arbitrators have found most useful. Its Journal is published four times a year.

Because its Membership is spread throughout the world, it has in view the setting up of branches, both in the Dominions and Colonies, and aims to render in the British Empire the service given by the American Arbitration Association in the United States of America, and the Inter-American Commercial Arbitration Commission in the Three Americas.

The Institute, through its President, Lord Askwith, was responsible for the 1934 Arbitration Act.

THE ARBITRATION JOURNAL will carry news of its activities and will furnish information concerning its organization and work.

THE LONDON COURT OF ARBITRATION. The name, London Court of Arbitration, was adopted in 1903 when it succeeded the London Chamber of Arbitration which had been founded in 1892 by the Corporation of the City of London and the London Chamber of Commerce. Since then it has been located at the Chamber of Commerce and cooperates most closely with it.

The name, Court of Arbitration, is a misnomer in that the Court itself does not sit as a tribunal and is not a panel of arbitrators. Its chief function is to appoint arbitrators and umpires at the request of the parties. While it originally did educational work by encouraging recourse to commercial arbitration, the advantages of arbitration are so universally known and recognized in England now, that the activities of the Court are almost exclusively bound up with the actual carrying through of arbitration proceedings. For that purpose, a register of arbitrators

classified under the heads of the various trades and professions is maintained. The names in each list are selected with a view to combining expert knowledge with a high standard of impartiality and integrity.

The Court adopted rules of procedure which were recently amended so as to conform with the provisions of the British Arbitration Act of 1934. The submission clause which the London Court recommends for insertion in contracts is as follows:

> The construction, validity and performance of this contract shall be governed by the law of (England) and all disputes which may arise under, out of, or in connection with, or in relation to this Contract shall be submitted to the Arbitration of the London Court of Arbitration, under and in accordance with its Rules at the date hereof. The parties hereto agree that service of any notice in the course of such arbitration at their address as given in this Contract shall be valid and sufficient.

The Court has a Registrar and several assistants as permanent officers. One of the most important offices of the Registrar is to assist the arbitrators and the parties in the conduct of the arbitration proceedings. The Court has a fixed scale of fees and charges for the arbitrators and the expenses of the Court. The scope of the court's work is, of course, not limited to disputes between British subjects only. On the contrary, in recent years the Court has appointed arbitrators in disputes between British nationals and nationals of almost all the more important foreign countries. Moreover, the activities of the Court are not restricted to commercial cases. The aid of the Court has been invoked in cases involving disputes concerning the erection of buildings, disputes under insurance policies, under partnership agreements, under letters patent and license agreements, controversies over evaluation of goods, non-delivery of goods, etc.

COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION. The International Chamber of Commerce and the American Arbitration Association have established a joint committee for the purpose of harmonizing the procedure of the two organizations, with a view to having the Association administer proceedings under the joint auspices of the Chamber and the Association when one of the parties is an American and the arbitration is to be held in the United States. The members of the Joint Committee charged with this undertaking are: Messrs. Willis H. Booth, John H. Fahey and Fred I. Kent, representing the Association, and Mr. Benjamin H. Connor representing the Chamber.

SYSTEM OF VANCOUVER MERCHANTS EXCHANGE. The Vancouver Merchants' Exchange, comprising all the shipping, import and export firms in the port, and its allied organization, the Vancouver Grain Exchange, have practically identical systems of arbitration which differ, however, in one important point and offer an interesting comparison of two methods of securing compliance.

Under the facilities of the Grain Exchange, arbitration is, to all intents and purposes compulsory. In the event one member calls for arbitration and the other refuses, compliance is obtained under pain of suspension or expulsion from the organization.

In the Merchants' Exchange, the good offices of the Board of Trustees are relied upon to secure compliance of the reluctant party, and in practice it has been found that seldom does any member refuse to arbitrate for the obvious reason that by so refusing he would be denying to another member the use of machinery set up by the Exchange for the good of all.

Until about three years ago, the By-Laws of the Merchants' Exchange followed the method of allowing each party to choose his arbitrator, the two so appointed then agreeing upon a third. The considerable number of appeals led to the conclusion that they arose from what were practically one-man decisions. By laws were changed so that a Board of Arbitrators, elected at the annual meeting of the membership, considers each case and appoints a committee of three or five arbitrators, with the result that in this 3-year period there has been but one appeal.

An unusual feature of the Grain Exchange facilities concerns disputes involving $100 or less, which are referred to one arbitrator, with no appeal from the award except upon consent of the Council.

AMERICAN

ARBITRATION ARTICLE PRODUCES 500 INQUIRIES. An article by Felix M. Warburg—"Why Not Arbitrate?"—which was reprinted in the August, 1936, issue of the Reader's Digest has prompted the greatest number of inquiries ever received from any article on the subject. More than 500 inquiries have been received from Digest readers in 40 states and in a number of European countries, ranging from simple requests for further information to the submission of intricate problems in family or business relationships. As a result of these inquiries a number of cases have already been referred to arbitration, although in

a large percentage of the problems presented it was found to be impossible to secure the voluntary consent of both parties.

ARBITRATION LAW ENDORSED BY BANKERS. In its recommended Program of State Legislation for 1937, submitted to the State Legislative Council for proposed enactment by State Legislatures, the American Bankers Association includes a draft of a State Arbitration Act based upon modern practice of arbitration in the United States. Among its provisions is one making valid and enforceable an agreement to arbitrate a future, as well as an existing, dispute. The recommendations were formulated by the Association's Committee on State Legislation, of which D. J. Needham is General Counsel and Secretary.

UNFAIR RETURNS IN RETAIL TRADE. A permanent clearing house for the interchange of information and joint action in connection with unfair returns is being established by the Apparel Industries' Inter-Trade Bureau. This Bureau comprises the executive heads of the various garment trade associations in New York, according to an announcement made by Samuel Klein, Executive Director of the Industrial Council of Cloak, Suit & Skirt Manufacturers. For the time being the clearing house will serve also as the medium for gathering data to be used in an effort to solve the returned goods problem through buyer and seller cooperation, thus serving the dual purpose of assembling a comprehensive body of information on the subject and of functioning in any arbitration agreement entered into between the garment trade associations and the National Retail Dry Goods Association.

"Prospects of reaching an accord with the retailers' organization on a plan for averting controversy and litigation in connection with returns are extremely bright", said Mr. Klein.

UNIVERSITY PROFESSORS CONSIDER ARBITRATION. The Association of American University Professors has appointed a national committee on author-publisher contracts, which plans to prepare a model form of agreement. The report of the committee to the annual meeting of the Association at Richmond, Virginia, December 28 and 29, 1936, contains the following statement: "The committee plans probably to include in its form a provision for arbitration of disputes under the auspices of the American Arbitration Association."

BOILER MANUFACTURERS ADOPT ARBITRATION. The Water Tube Boiler Branch of the American Boiler Manufacturers Association and Affiliated Industries has adopted arbitration under the procedure of the American Arbitration Tribunal, and incorporated the Association's arbitration clause in its Standard Contract Form. This Branch has also recommended similar action to the other branches of the industry.

TRADE PRACTICE RULES OF BUFF AND POLISHING WHEEL MANUFACTURERS. The National Council on Trade Agreements of the American Arbitration Association has been advised by John T. McGovern, attorney for the Buff and Polishing Wheel Manufacturing Industry, that the Federal Trade Commission has approved a group of trade practice rules [1] which will make many of the important features of the trade agreement applicable to all members of the industry. Three of the rules approved by the Federal Trade Commission are of interest to all trade groups:

One of these rules makes it a Group One violation and an unfair trade practice for a seller to sell below costs in circumstances related in the rule. The important phrase in this rule is that the seller's theory or figures or practice, however convincing to him as honest and proper, may not relieve him from the violation, if a competent inspecting accountant should find standard accounting methods had not been properly applied by the seller. This rule applies to every member of the industry.

Another rule provides for a Trade Practice Committee of the industry and appointed by it, which acts with and aids the Federal Trade Commission to detect and complain of all fair trade practice violations and bring about enforcement of penalties for such violations.

A third rule, which is a Group Two rule, provides that disputes between members of the industry and their customers should be submitted to arbitration.

This rule is supplemented for members of the industry participating in the trade agreement, by the adoption of the Rules of the American Arbitration Association for the arbitration of all controversies arising out of the trade agreement.

[1] Obtainable, upon request, from the American Arbitration Association.

ARBITRATION LAW

FOREWORD

BY

WESLEY A. STURGES

Professor of Law, Yale University, and Chairman of the Law Review Committee

THE APPEARANCE of this, the first number of THE ARBITRATION JOURNAL, signalizes anew how extensive is the interest in the modern practice of arbitration. Those who conceived the plan of THE JOURNAL and those who are sponsoring its publication fully realize that modern arbitral practice is carried on in this country and abroad pursuant to a great variety of administrative systems and under the supervision of a great variety of organizations and associations. They also realize that the practice is subject to the inevitable variety and conflict of laws which attend interstate and international commercial transactions. THE JOURNAL will be a pioneer in searching out, collating, and reporting this knowledge.

It seems especially fortunate that THE JOURNAL is to be composed of two general sections, one devoted to the analysis and exposition of the modern practice of commercial arbitration, and the other to the analysis and exposition of the legal decisions and statutory law which regulate that practice and determine the validity and enforceability of arbitral proceedings and awards.

Those who are chiefly interested in the actual administration of a system of arbitration, promulgated, for example, under the rules and regulations of a particular trade association, and those who do business under that system, will be especially interested in comparing their practices and arbitral rules and regulations with those of contemporary systems which will be discussed in THE JOURNAL. They will also be concerned to check and verify from time to time the validity and effect of the details of their procedure by the current legal decisions and statutory changes which will be discussed in this legal section of THE JOURNAL.

It is equally certain that the newly acquired intelligence concerning the present-day systems and practices of arbitral procedure will challenge new and more comprehensive studies as to

the expediency and adequacy of both the case-law and the statutory law which have been and will be adjudged by the courts and enacted by the legislatures respectively.

Special mention also should be made of the international aspects of these subjects of study. THE JOURNAL promises a new medium whereby we in the United States may learn more thoroughly the practices and laws of other countries relating to arbitration, and whereby those of other countries may gain like understanding of our practices and laws. And certainly it is not in vain to hope that uniformity of arbitral practice and uniformity and continuity of laws relating to that practice may be accomplished, notwithstanding State and National political boundaries.

Such is the general point of view and such are the general objectives of the Committee which is charged with the editorial functions of the legal section of THE ARBITRATION JOURNAL. In short, we shall undertake promptly to report and discuss current decisions and statutes affecting arbitration in the light of the present day practice. We shall also seek critically to evaluate these legal developments and how they may facilitate or impede the progress of sound arbitral practice in domestic and foreign trade and commerce. As these studies disclose desirable reforms of law or practice they will be voiced in due course.

It remains to supplement these statements of general objectives of the legal section of THE JOURNAL with a further comment upon the point of view of the Committee as to the relation of the lawyer and arbitral procedure. To lawyers the arbitration of commercial causes conducted under adequate rules and regulations has fully proved itself a more flexible and expeditious remedy than traditional proceedings in the courts; it is less technical; it is sufficiently judicial. More specifically stated: By the use of the arbitral process, the judge or judges may be selected by reason of his or their special qualifications to hear and decide the particular case; the many questions arising in traditional litigation involving only niceties of service of legal process, sufficiency of pleadings, admissibility of evidence under rules frequently of only traditional validity, and other matters of procedure which are likely to have no bearing on the decision of the ultimate issues in the cause, are reduced to a minimum, if not entirely obviated in an arbitration; the " merits " of the case may be brought on directly for hearing and decision in an arbitration.

On the other hand, while these are the advantages of arbitral procedure over litigation in commercial causes, it is not amiss to emphasize the dependence of the procedure upon the lawyer. Experience has verified that interdependence. Just as the complexity of modern commercial transactions and the intricacy of the controversies arising out of them prompt the selection of judges who are specially qualified by their knowledge and training to understand the particular controversy and its commercial background, so does the professional training of the lawyer serve the indispensable purposes of identifying and settling the issues of the case. So does the lawyer's professional training qualify him for the presentation of fit evidence in understandable fashion; so does his training in the method of advocacy serve a necessary function in the presentation of briefs and oral argument on the merits of the cause.

In short, these conceptions of the reciprocal relations of lawyers and arbitrations will necessarily affect the point of view of the Committee in its legal studies, its evaluation of current legal materials, and its considerations of proposed reforms affecting the law or practice of commercial arbitration.

One further brief word upon the content of the present number may be proper. It will be noted that the leading article by Mr. Kupfer is directly related to the symposium in the preceding part of THE JOURNAL upon the present day practice in arbitrating claims arising under certain classes of insurance. How far shall appraisals and valuations under insurance policies and other contracts be brought into the legal category of "arbitration"? Mr. Kupfer's studies of this and allied questions which are discussed in his article indicate their own importance.

Mr. Nordlinger's report of proposed amendments to the New York Arbitration Law, which have been approved by the Association of the Bar of the City of New York, are of immediate importance. It scarcely can be estimated how many arbitration clauses and arbitration systems will be materially affected by these amendments if they become a part of the Arbitration Law of New York. By the same token do they challenge the candid study of all persons who may be subject to, or concerned with, the administration of arbitration clauses or procedures which may be subject to the law of the State of New York.

A BRIEF RÉSUMÉ OF THE ENGLISH SYSTEM OF ARBITRATION

BY

QUINTIN McGAREL HOGG [1]

Barrister-at-Law and Fellow of All Souls College, Oxford

THE ENGLISH LAW of Arbitration provides an interesting study for American lawyers. To them it is easily intelligible, for its principles are a direct development from the Common Law of England, but it is greatly instructive because the Arbitration Acts 1889-1934 have, it is claimed, evolved a code for procedure in arbitrations which is possibly in advance of anything found elsewhere. Moreover, the practice of imposing a statutory obligation to arbitrate has become one of the integral parts of the socialistic legislation, one of the main political features of modern England, and as such is an interesting study for those who desire to keep abreast of development in foreign countries.

I assume in my American readers a knowledge of the Common Law affecting Arbitration. I propose to discuss the English Law as it exists under the Statutes without any detailed exposition of the legal history or law of which they are developments. This history and this law are part of the common inheritance of Anglo-American jurisprudence. I only mention points upon which Statute has modified, reversed or extended the Common Law.

The subject can be conveniently discussed under the heads: (1) Nature and effect of the submission; (2) The Arbitrators, their appointment, powers, and position; (3) The conduct of the reference; (4) The Award; (5) Costs. I add a short paragraph on the enforcement of foreign submissions and awards.

(1) *The Submission.* Oral submissions are still in theory possible, but are in practice obsolete; the Statutes do not in general apply to them, and the right of revocation, together with the impossibility of enforcing awards made under them otherwise than by action, renders them unworkable in practice.

An English submission to arbitration within the Acts is defined to be " a written agreement to submit present or future disputes to arbitration whether an arbitrator is named therein or not ".

[1] See, also, review of Mr. Hogg's book on p. 108.

Two points deserve attention: (1) A submission under the Acts is none the less a submission because entered into before the occurrence of a dispute; (2) The arbitrator need not be named by the parties to the submission, who may wait until a dispute arises to make their nomination or, as will be seen, one may be nominated by the Court.

English commercial contracts regularly contain a clause such as the following: "All disputes arising out of this agreement shall be referred to arbitration."

The object and effect of the Arbitration Acts is to render such a clause enforceable as a submission.

A necessary corollary to the statutory definition is a statutory list of implied terms which can be read into an arbitration clause or other submission in the absence of a contrary intention appearing. Such a list is provided by the first Schedule of the Act of 1889, now amended by the Act of 1934. Notable amongst its provisions are the following: (1) If no other mode of reference is provided reference is to a single arbitrator; (2) In a reference to two arbitrators these have an implied power to appoint an umpire; (3) The arbitrator has the like power as a judge as to ordering pleadings, discovery of documents, etc., and examining the parties and their witnesses on oath; (4) Costs are in the discretion of the arbitrator; (5) The arbitrator may order specific performance and may make an interim award.

Parties are of course not bound to agree upon these terms in order to benefit by the Acts; on the contrary, trade associations and other bodies often prefer to substitute their own codes of rules for some or all of those normally implied by Statute.

When parties have entered into a submission they are bound by it, for the Courts have a power, which they will normally exercise, of staying any proceedings brought in respect of any of the matters agreed to be referred. The submission may not be revoked without leave of the Court (which is seldom given), and the effect of the Statutes is to make an agreement for arbitration enforceable unless the dispute involves an issue of fraud (in which case even a provision that arbitration is to be a condition precedent to the right of action will not now necessarily bind the parties) or unless the party desiring to claim arbitration has been guilty of some delay. A submission is no longer automatically revoked by the death of one of the parties.

As an explanatory historical note it may be added that submissions are not now made rules of court. The Act of 1889 provides that they have *ab initio* the same effect as if they had been made rules, but subsequent more detailed statutory provisions have, in fact, rendered this provision obsolete.

(2) *The Arbitrators.* Under the English Law any disinterested person may act as arbitrator; but once he acts he is subject to the supervision of the Court, which, as will be seen, may remove him or permit a party to the submission to revoke the submission. It should be observed that if the arbitrator is likely to be biased, it is not now a ground in England for refusing leave to revoke the submission that the parties knew or ought to have known at the time of submission of the likelihood of such bias.

The appointment of the arbitrator or arbitrators is, of course, left in the first place to the parties, but the Acts have provided a series of rules for appointment or replacement by the Court in the event of the parties not agreeing or in case their appointment proves abortive. Where each party is to nominate his own arbitrator and one fails to do so, his opponent may appoint his own nominee to act as sole arbitrator in the reference.

Once appointed, the arbitrator is free to conduct the reference on his own lines, but good behavior is guaranteed by the supervision of the Courts.

If an arbitrator or umpire fails to use due dispatch in entering on a proceeding with the reference he may be removed by the Court—such removal disentitling him to his remuneration. Arbitrators may also be removed for misconduct or the submission be revoked.

Should a question of law arise during the reference, the arbitrator can be compelled, in the discretion of the Court, either to state a special case for the opinion of the Court, or to return his award in the form of a special case for the opinion of the Court. He may also (and frequently does) exercise this power of his own volition. The Court will not, however, exercise its power of directing a case if one purpose of the arbitration was to get the specific question of law decided by the arbitrator.

(3) *Conduct of the Reference.* The Court has power to supplement the authority of the arbitrator during the course of the reference by making special orders, among other things, for security for costs, discovery of documents, giving evidence by

affidavit, or on commission, the sale or custody of goods which are the subject matter of the reference, interim injunctions and the appointment of a receiver. Apart from this power of the court, the conduct of the reference is in the hands of the arbitrator, whose powers are defined by the terms of the submission or by the statute.

(4) *The Award.* The award may, by leave of the Court, be enforced like a judgment or order to the same effect, and judgment may be entered in the terms of the award. This summary procedure, however, is available only when no substantial objections are raised against the award. When the award is substantially challenged the parties are left to their remedy by action on the award. The enforcement of awards by attachment is now obsolete in practice.

The Acts provide machinery for setting aside awards on the familiar common law grounds of misconduct or error on the face of the award; they also provide that in such case the award may be remitted to the arbitrator for reconsideration, a practice which is constantly used.

(5) *Costs.* Costs are in the discretion of the arbitrator, unless the contrary is provided by the parties. These include (rather perversely) the amount of the arbitrator's own remuneration. A useful provision, however, renders the arbitrator's bill, like a solicitor's, liable to review by taxation by the Court. If the award fails to determine the question of costs there is a useful provision by which the arbitrator may be asked to amend it.

Foreign Arbitrations. One of the most significant developments of recent years has been the movement which culminated in the Protocols (not signed by the United States) whereby numerous nations have agreed to give mutual facilities for the enforcement of arbitration agreements and awards made in their respective jurisdictions. These Protocols have been implemented in Great Britain by the Arbitration Clauses (Protocol) Act 1924 and the Arbitration (Foreign Awards) Act 1930, which have marked a considerable advance in the progress of international arbitration.

APPRAISALS UNDER ARBITRATION LAWS

BY

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ONE of the salient characteristics of our Common Law has always been its liberality in permitting parties by contract to adjust their own relationships. To this general tendency there have been certain notable exceptions. Contracts have been declared illegal which were found presently or potentially inimical to the general welfare of the state as a social unit; others, induced by fraud and kindred iniquity and those entered into under mistake, not representing real agreements, have been voided to protect individual interests.

One class of contract, however, has been disfavored as against public policy, not because it was destructive of social well-being, nor because injustice to the individual required that it be stricken down, but because it was destructive of the prerogative of the very courts which were creating the common law.[1] This was the contract to arbitrate, which the courts considered an ouster of their own jurisdiction.[2] They rendered it ineffective by holding that an agreement to arbitrate is not specifically enforceable and is revocable by either party at any time before an award is made.

But, impelled by the natural public desire for more expeditious, inexpensive and less formal settlement of disputes, the courts were themselves compelled to provide escapes from their own

[1] See, *President, etc., D. & H. Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, at 258 and 259 (1872),

> " The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law. . . . ."

The citations are not intended to be exhaustive and for further citation see Sturges, *Commercial Arbitrations and Awards* (1930), an invaluable source. Acknowledgment must also gratefully be made to Burton A. Zorn, Esq., of the New York Bar, for his assistance.

[2] There is a critical treatment with complete citation of authority in the opinion of District Judge Hough in *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y., 1915); see as a typical statement *Insurance Co.* v. *Morse*, 2 Wall. (U. S.) 445, 451 (1874).

rule. Even at common law, as will be presently noted, certain contract provisions, in their nature arbitral, were held to be so "subordinate" as not to come within the general proscription. And, finally, the banns were lifted altogether with the enactment of the Arbitration Laws first in England and then in the states and nation.

Curiously enough, in interpreting these Arbitration Laws, the courts have declined to take as within their diet the very morsels which they had found delectable when there were no Arbitration Laws at all. It is to this anomalous situation that we propose to address ourselves.

The Common Law History

At Common Law, contracts to arbitrate were not specifically enforced by the Chancellor, because, not only did the courts feel that their jurisdiction was being ousted, but also because equity would not force a party to exercise his discretion in the choice of an arbiter nor later compel that arbiter to act.[3] But this was not the only result of the aversion of the courts to such contracts. Even though a party had commenced to arbitrate as he had agreed to do, the courts permitted him to "revoke" the agreement and rest on his rights, as if there had been no arbitration provision.[4] Despite this opposition of the courts to arbitration, their natural abhorrence to a forfeiture led to an escape from the rule of non-enforceability where the parties could no longer be returned to *statu quo*.

The typical case presented to the courts was that of a lease with a renewal clause, providing for rent to be determined by arbiters,[5] or payment by the landlord for buildings placed upon the land by tenants at a valuation thus to be determined.[6] In such a case, to leave the parties where they stood would have involved an unwarranted sacrifice by one party. To prevent such

[3] *Milnes* v. *Gerry*, 14 Ves. 400 (1807); *Mutual Life Insurance Co* v. *Stephens*, 214 N. Y. 488; 108 N. E. 856 (1915); *Goerke Kirch Co.* v. *Union Co.*, Cir. Ct., 185 Atl. 375 (1934); Hayes, *Specific Performance of Contracts for Arbitration or Valuation*, 1 Cor. L. Q. Rev. 225 (1916).

[4] See cases cited in *U. S. Asphalt Ref. Co.* v. *Trinidad Lake Pet. Co.*, *supra*, note 2, and see *Greason* v. *Keteltas*, 17 N. Y. 491, 496 (1858).

[5] *Kaufmann* v. *Liggett*, 209 Pa. St. 87, 58 Atl. 129 (1904).

[6] *Mutual Life Ins. Co.* v. *Stephens*, 214 N. Y. 488, 108 N. E. 856 (1915); see also *Dinham* v. *Bradford*, L. R. 5 Ch. 519 (valuation of partnership property on dissolution).

forfeiture, the courts interpreted the agreement to mean not that a price to be fixed by arbiters be paid, but merely that "fair value" be paid.

Although by agreement of the parties, this "fair value" was to be determined by the arbiters, the courts themselves proceeded in the first instance to determine fair value and then to implement their determination by giving judgment for it. In order to justify this escape from the prohibition against arbitration contracts, the courts called the price-term (to be determined by arbitration) a mere "subsidiary" or "incidental" term of the contract, not vitiating the contract as a whole.[7] This, of course, was hiding the judicial head in the sand of logic. Obviously, in a contract for purchase, the price-term and its method of determination is anything but "incidental and subsidiary"; it is, on the contrary, probably the most important term, and where the contract was executory, the courts recognized this fact by refusing specific enforcement.[8]

A basis of avoiding the rule that an agreement to arbitrate is revocable was shortly forthcoming. In the leading case of *Scott* v. *Avery*,[9] the court held that where a contract of insurance called for an appraisal as a "condition precedent" to suit upon the policy for a loss, no suit might be brought until there had been compliance with this condition. By the mere inclusion or implication of this "condition-precedent" clause, at least a negative enforcement of an arbitration clause was accomplished. A party who had not adhered to his agreement for an arbitration could not resort to the courts for enforcement of his rights.

From this starting point, the doctrine spread to America. But, in attempts to broaden its scope so as to include types of dispute other than appraisals, litigants were usually doomed to disap-

[7] What the court is trying to do in such a case is to say that the arbitrator's duty is ministerial rather than judicial. *Gonzalez* v. *Gonzalez* (dissent) 174 Cal. 588, 604, 163 Pac. 993 (1917). The criticism in Note 36, Har. L. Rev. 726, 728 (1923) is quite pointed:

> "Although the rental for a renewal period may be incidental to the main purpose of the original agreement, yet at the time for specific performance it must be considered of the essence. It cannot be assumed that the method for determining the amount was intended to be merely a matter of form. There should be some other basis for the decisions."

[8] *Milnes* v. *Gerry*, note 3, *supra*, is such a case.

[9] 5 H. L. Cases 811 (1855).

pointment.[10] However, the inherent convenience of other and similar contracts for the determination of what were called " subsidiary points " in contracts by extra-judicial means caused the courts to extend this exception to a few other similar situations, the most notable of which were those in which an engineer's or architect's certificate was made a condition precedent to suit for the price of work done.

In rationalizing these " condition precedent " decisions, the courts created a distinction between arbitration and appraisal or valuation.[11] They reasoned that an appraisal determines only one term of a contract, but not the liability of a party. It was not, therefore, an " ouster " of the court's jurisdiction, for, though the price was determined by arbitration, suit upon any right which this determination might involve must still be brought in the regular courts and in the original course.

The fallacy of such a holding is self-evident. Ordinarily, liability is plain where once the valuation feature has been settled. The court, if ever, is certainly ousted of jurisdiction in such a case. Calling arbitration only a condition precedent in these cases was but a confused extension of the doctrine of the cases in which the courts themselves had determined " fair value " in an incomplete but partially performed agreement. It was negative enforcement of arbitration as provided in the contract itself. Nevertheless, this negative enforcement was arbitrarily limited by the courts to the appraisal situations in which they had held that there was no " ouster ".

Appraisal and Valuation under the Arbitration Statutes

The development in England from this point of negative enforcement by making an appraisal a condition precedent to suit was rapid, and statutes soon provided for specific enforcement of arbitration agreements as well as methods for entering judgment upon the award of arbiters.[12] Unfortunately, however, the lan-

[10] See, *Miles* v. *Schmidt*, 168 Mass. 339, 340 (1897). The cases are collected at 47 L. R. A. (N. S.) 337, 387.

[11] The dual requirement was that the clause be (1) in form a condition precedent and (2) provide for arbitration of limited " collateral " facts only. *Seward* v. *City of Rochester*, 109 N. Y. 164 (1888) citing the leading American case upholding extra-judicial determinations, *Pres., etc., D. & H. Canal Co.* v. *Pa. Coal Co., supra*, note 1.

[12] 3 and 4 Will. c. 42, 9 Will. 3 c. 15, superseded by 52 and 53 Vict. c. 49 (1889).

guage upon which the original escapes from the unenforceability of arbitration agreements were based involved the courts in a strange snarl.

The first important case involving the distinction to arise under the statute in England was *In re Carus-Wilson and Greene.*[13] There, a contract for the sale of land provided that the value of timber be appraised and that amount be included in the price. The vendor, dissatisfied with the amount awarded, moved to vacate the award upon grounds provided in the Arbitration Statute for setting aside an arbitration award. The court denied his motion on the ground that the contract provided, not for an arbitration within the statute, but for a mere valuation. It drew a distinction between a judicial inquiry and a valuation by an expert " by the exercise of his knowledge and skill ". Using a phrase derived from the condition precedent cases that was to have unfortunate consequences, Lord Esher, M. R. said: " He was not to settle a dispute which had arisen, but to ascertain a matter in order to prevent disputes arising."

In thus sustaining the decision of the extra-judicial tribunal selected by the parties, the court suggested that the qualifications of the arbiter chosen by the parties differentiated a judicial inquiry—called an " arbitration "—from a " mere appraisal ". No reason was suggested, however, why a non-judicial inquiry was not an arbitration within the statute.

The doctrine of that case was extended in *In re Hammond and Waterton* [14] by Williams, J., who had been of counsel in the *Carus-Wilson* case. It seems that a market-gardener was to value property which was left upon the land at the time of a nurseryman's surrender of his lease prior to its expiration. The market-gardener made the valuation and the nurseryman applied to the court under the Arbitration Statute to issue execution upon his award as upon the award of an arbitrator. The court denied the application on the ground that there had been no arbitration, explaining its process of differentiation as follows:

> It may be necessary, before arriving at a conclusion whether an umpire is to decide a question upon evidence produced before him or by the exercise of his own skill and knowledge, to take into consideration who the umpire is.

[13] 18 Q. B. D. 7 (ct. of appeal 1886).
[14] 62 L. T. 808 (1890).

Here, then, there was a statute ready at hand to lend the force of judgment to the award, but curiously enough the court refused to give it effect, by preserving a distinction first used in the *Carus-Wilson* case to sustain an award. The damage to that plaintiff caused by such a holding was theoretically not very great. The effect was merely to force him to suit upon an award which would then be upheld as a " valuation ". But the rationale of the case has lived to plague courts down to the present.

Similar cases based on different reasoning have arisen elsewhere where the convenience of finality might have been given to an award. Thus, statutes provide for a submission of any " controversy which might be the subject of a civil action " and entry of judgment upon the award. Because only " value " and not complete liability had been determined by the arbiters, there was difficulty in formulating a judgment based upon the award. Instead of adapting the form of their judgments to the individual requirements of the case,[14a] the courts avoided the issue by holding that value alone was not a justiciable issue giving rise to a controversy. Valuation was not, therefore, " arbitration " within the purvue of the statute, and the litigants were deprived of the statutory remedies.[15] To support this holding, reliance was placed on the earlier authorities distinguishing appraisal and arbitration, which had been developed to sustain valuations as conditions precedent. The doctrine of the cases which followed *Scott* v. *Avery* was put into reverse.

But more serious damage from adherence to the traditional distinction between appraisal and arbitration results from its application to those statutory provisions which furnish the machinery for specific performance of an agreement to arbitrate. *Matter of Fletcher* [16] is the leading case on this point. There a contract provided that one Nicholas might, within 30 days of the determination of its fair value, purchase certain shares of stock held in escrow for Fletcher. The fair value was to be determined

[14a] It is a commonplace that " equity will mold its decree so as to do complete justice between the parties "—and compare declaratory judgments.

[15] *Hubbell* v. *Bissell*, 13 Gray (79 Mass.) 298 (1859); *Franks* v. *Franks*, 1 N. E. (2d) 14 (Mass., 1936); *Dore* v. *Southern Pacific Co.*, 163 Cal. 182, 124 Pac. 817 (1912).

[16] 237 N. Y. 440, 143 N. E. 248 (1924), noted in 34 Yale L. J. 98 (1924). Similar are: *Matter of Canaday*, N. Y. L. J., July 8, 1935; *Matter of Wishod*, N. Y. L. J., Nov. 24, 1931.

by three arbiters, one to be appointed by Fletcher, one by Nicholas and a third by the other two. Fletcher brought an action against Nicholas and the escrowees for delivery to him of the stock, alleging that Nicholas had "intentionally caused the failure to appoint a third arbiter". The court refused to determine "fair value" in this suit, because Fletcher failed to prove that Nicholas had thus blocked the appraisal. Shortly thereafter, the New York Arbitration Law was passed and Fletcher, after vain attempts to procure the appointment of a third arbiter without the court's intervention, brought on this proceeding under the Act to have the court appoint one.[17] But the court refused to do this, and remitted Fletcher to the same kind of a cause of action as that upon which Nicholas had once before defeated him.

In his opinion for the court, Judge Lehman gave several reasons for holding that the case was not within the statute. First, as a matter of interpretation of language, the statute did not cover the dispute because it was not a contract to "settle a controversy". In reasoning that the appraisal procedure was a method of avoiding a dispute rather than a method of settling one, and that hence there was no "controversy", the court used almost the very language Lord Esher used in the *Carus-Wilson* case to uphold the extra-judicial arrangement of the parties, saying:[18]

> The provisions of the Arbitration Law are properly applicable to any contract where the parties have agreed to substitute for the courts an informal tribunal of their choice in the settlement of a controversy, but they are not applicable where the parties have agreed only to permit third parties to decide a particular matter instead of attempting to reach an agreement themselves.

A second reason given by the court for its interpretation of the Arbitration Law was that the parties to such a contract would not know whether or not they were required to adhere to the strict procedural requirements of a statutory arbitration, or whether an informal appraisal, valid as a condition precedent even before the statutes,[19] was enough. But it would seem that

[17] Sec. 4 of the N. Y. Arbitration Law provides for court appointment of a third arbitrator where the parties fail to appoint pursuant to a contract.
[18] 237 N. Y. 440, at 451.
[19] See, *Wurster* v. *Armfield*, 175 N. Y. 257, N. E. (1903).

if, prior to the act, a proceeding informal in nature was determinative, that the act should not be held to invalidate such a proceeding, but only to furnish additional remedies.[20] Many courts, including the New York courts themselves, have decided that though an arbitration did not comply with the statutory procedural requirements, it might, nevertheless, be upheld as a valid common law arbitration.[21] It would seem that there is even more reason for sustaining a valid common law appraisal or valuation.[22]

Like others, this Court is also troubled by the difficulty of formulating a conditional judgment, saying that it furnishes a "clumsy remedy". In the *Fletcher* case, however, all that the arbitration would have decided was the price at which Nicholas might purchase the stock—not that it must be purchased. Had the court ordered the appointment of a third arbiter there could have been no difficulty. Price being determined, the parties could immediately resort to their legal or equitable remedies. Even if the case had arisen differently, as, for instance, on a motion to enter judgment on an award by the arbitrators, it seems that the court had power enough to enter a judgment ordering delivery of the stock to the petitioner if the amount—already ascertained as the "fair value"—were not paid by the respondent.

There seems to be no reason to regard statutory arbitration solely as a substitute for the courts in determining disputes. If arbitration can anticipate some of the machinery necessary to bring a case into form for judicial treatment by determining preliminary issues, then it would certainly seem that "beneficial" interpretation of the law includes giving it this additional function.

To summarize: The Courts have long been prone to enforce reasonable agreements to decide "value", outside their own fora.

[20] *Hanover Fire Ins. Co.* v. *Lewis*, 28 Fla. 209, 10 So. 297; *McQuaid Market House Co* v. *Home Ins. Co.*, 147 Minn. 245, 180 N. W. 97 (1920); *Peterson* v. *Granger*, 137 Wash. 668 (1926); *Williams* v. *Hamilton Fire Ins. Co.*, 118 Misc. 799 (1922), noted in 8 Cor. L. Q. 53 (1922); *Matter of American Ins. Co.*, 208 App. Div. 168, 203, N. Y. S. 206 (1924).

[21] *Burnside* v. *Whitney*, 21 N. Y. 148 (1860); *Dore* v. *Southern Pac Co.*, note 15, *supra.*

[22] In such a case, if the courts specifically enforced an appraisal clause as an arbitration, it would probably be necessary to adhere to the statutory formalities of hearing and oath required by the arbitration statute.

Arbitration of other disputes is newly in favor with them through the instrumentality of the Legislature. The history of the distinction between appraisal and arbitration would seem but little reason for the exclusion from the convenience of statutory arbitration of those disputes in which the courts had previously found themselves free to enforce the intention of the contracting parties. It was plainly within the contemplation of the parties that there was a likelihood of a dispute as to value when they signed a contract including the appraisal clause; and it was also plainly their intention to have some form of extrajudicial determination of this prospective "controversy". It is the purpose of an arbitration law to effectuate this intention of avoiding litigation when expressed in a contract. If the *Fletcher* case and similar cases are regarded—as we think they must be—as holding that a contrary tradition under *stare decisis* has already been created, it is for the Legislatures to enlarge the arbitration statutes so as specifically to include agreements for valuation without invalidating those more informal determinations of appraisers, engineers and the like, which had a degree of utility even before arbitration statutes lent their aid.

PROPOSED CONSOLIDATION OF THE NEW YORK STATUTES RELATING TO ARBITRATION

BY

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THE NEW YORK statutory provisions governing agreements to submit existing controversies to arbitration, are very old. They are found in Article 84 of the Civil Practice Act (§§ 1448 *et seq.*; originally Article 83; where they were taken over from Chapter 17, Tit. 8, §§ 2365 *et seq.* of the former Code of Civil Procedure). No doubt because of their age, they contain certain technical requirements, such as that a submission agreement must be acknowledged (§ 1449), which seem no longer desirable.

Prior to 1920, agreements to submit to arbitration all controversies which might thereafter arise under a particular contract, were held to be revocable and unenforceable (*Meacham* v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346). Even agreements to sub-

mit existing controversies to arbitration might be revoked at any time before the closing of the proofs and the final submission of the cause for decision, leaving to the other party only a cause of action for the expenses incurred in the conduct of the arbitration (Code of Civil Procedure, § 2383; *People ex rel. Union Insurance Company of Philadelphia* v. *Nash*, 111 N. Y. 310).

In 1920, the New York Legislature enacted its Arbitration Law, which was the pioneer statute in the United States, making agreements to arbitrate future as well as existing controversies irrevocable and enforceable. Section 2 of that law provided that submissions under the Code of Civil Procedure or Civil Practice Act " shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract ". The same force and effect was given to " a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract ".

While a provision or clause to submit future controversies to arbitration must be in a " written contract " to come within this law, it need not be acknowledged nor signed; and it has been held under this section that an otherwise valid written agreement to arbitrate will be enforced, even though unsigned (*Japan Cotton Trading Co.* v. *Farber*, 233 App. Div. 354). The requirement of acknowledgment of submissions of existing controversies, however, still exists.

With the enactment of the Arbitration Law as part of the Consolidated Laws, the Legislature did not repeal Article 84 (83) of the Civil Practice Act, except certain sections directly inconsistent with the new Arbitration Law. Thus we had, and we still have, in New York, two separate statutes governing arbitration, one forming part of the Civil Practice Act and the other part of the Consolidated Laws. In order to find all the law with regard to any particular problem relating to arbitration, both laws must be consulted.

The Special Committee on Arbitration of the Association of the Bar of the City of New York believes that the foregoing statutes should be consolidated in the Civil Practice Act along with other matters of procedure of which arbitration is a part (*Matter of Berkovitz* v. *Arbib and Houlberg*, 230 N. Y. 261). The Committee also believes that certain provisions of the Civil Practice Act and of the Arbitration Law—notably Section 4a—

should be modernized and improved to facilitate better practices under the law.

A subcommittee, headed by Osmond K. Fraenkel, with the benefit of suggestions and criticisms of representatives of the American Arbitration Association, the Chamber of Commerce of the State of New York, the National Federation of Textiles, Cotton Textile Institute and Professor Wesley A. Sturges of the Yale Law School, has prepared a proposed consolidation and revision of the New York statutes relating to arbitration which has been approved by the Committee and by the Association. The proposed revision has been submitted to the Judicial Council for consideration and it is hoped that it will be duly introduced and pressed for enactment in the Legislature this year.

The principal changes in the proposed revision are as follows:

1. Section 1448, subdivision 1, of the proposed revised statute provides that the guardian of an infant or the committee of an incompetent may make a valid submission to arbitration with the approval of the court. At present an infant or incompetent may not make a valid submission to arbitration (Civil Practice Act, § 1448, subdivision 1).

2. Section 1449 of the proposed revision provides that a submission of an existing controversy is valid if signed, even though not acknowledged. This does away with the rather archaic requirement of acknowledgment above referred to, which has been productive of much technical litigation (see *Matter of Buckley* v. *Lippman*, 223 N. Y. 539; *Bender* v. *Bloom*, 223 App. Div. 644; *Matter of Colwell Worsted Mills* v. *Glass*, 228 App. Div. 150).

3. Section 1450 authorizes the commencement of proceedings to compel arbitration by substituted service. At present personal service is required (Arbitration Law, § 3). There seems to be no good reason why arbitration proceedings may not be brought against a resident of the State in the same manner in which an action may be commenced.

4. Section 1451a contains an entirely new provision authorizing the moving party in an arbitration to obtain from the court any provisional remedies to which he would have been entitled had he brought an action instead of an arbitration proceeding without waiving his right to arbitration. There is considerable doubt whether it is possible to do this at the present time (*cf. Matter of Haupt* v. *Rose*, 265 N. Y. 108; *Newburger* v. *Lubell*, 257 N. Y. 383; *Matter of Young* v. *Crescent Development Co.*,

240 N. Y. 244; *Matter of Zimmerman* v. *Cohen*, 236 N. Y. 15; *Matter of Askovitz*, 229 App. Div. 258; *La Hay, Inc.* v. *Pathe Exchange, Inc.*, 237 App. Div. 468, affd. 262 N. Y. 483). There seems to be no good reason why a person, otherwise entitled to a provisional remedy, should be deprived of it because he desires to have the controversy adjudicated before arbitrators, under a valid arbitration agreement. The proposed provision will enable him to do so, leaving full control of the provisional remedy with the court.

5. Perhaps the most important change in the proposed revision is embodied in § 1458, which is intended to take the place of § 4a of the existing Arbitration Law.

Under the original provisions of the Arbitration Law it was held that where a party refused to proceed with an arbitration, the arbitration could not validly be held without first obtaining a court order directing that the arbitration proceed (*Matter of Bullard* v. *Grace Co.*, 240 N. Y. 388). To meet this decision a new § 4a was added to the Arbitration Law, providing that where one party refuses to arbitrate, the other party may nevertheless proceed without a court order in the manner provided in the arbitration agreement, reserving to any party who has not participated in the arbitration, the right to litigate later the question whether or not any valid arbitration agreement had been made. The Appellate Division held this statute to be unconstitutional on the ground that it compelled a party to elect whether he would try the case on the merits before the arbitrators, or question their jurisdiction, but prevented him from doing both (*Matter of Finsilver, Still & Moss, Inc.* v. *Goldberg, Maas & Co., Inc.*, 227 App. Div. 90). The Court of Appeals, however, reversed the Appellate Division and held the statute valid, holding that by implication it gave the unwilling party the right to try the case on the merits before the arbitrators under protest, reserving for later determination the question of the existence of a valid arbitration agreement (253 N. Y. 382). This decision saved the constitutionality of the statute, but it had the unfortunate effect of giving the unwilling party the advantage that a favorable award would be conclusive, while he would have the right to attack an adverse determination, otherwise valid, on the ground that there had been no valid arbitration agreement.

The proposed § 1458, while saving the unwilling party's constitutional right to question the existence of a valid arbitration

agreement, compels him to do so promptly. It provides that no person who has actually participated in an arbitration by selecting arbitrators or taking part in the arbitration proceedings may question the existence of a valid arbitration agreement. A party who has not participated in the arbitration may raise the question of the existence of a valid arbitration agreement by a motion to stay the proceedings; and, if such party has been served personally with notice of the arbitration, he must raise the question by serving a notice of motion for a stay within 10 days thereafter.

There are also a number of minor changes from the existing law in the proposed consolidation, but the foregoing is a summary of the more important ones.

It is believed that this revision will substantially clarify and improve the existing law of arbitration and it is hoped that it will be enacted into law.

COMMENTS ON CASES

PERJURY BEFORE ARBITRATORS IN ARBITRAL HEARING—EFFECT UPON AWARD—EFFECT UPON JUDGMENT ENTERED ON AWARD. The parties entered into a written agreement acknowledging an indebtedness of the plaintiff in the sum of $11,480 and left to arbitration a dispute concerning an additional indebtedness of $3,300. During arbitration, the defendant left with his attorney promissory notes in escrow which were to be returned to plaintiff if the decision was in his favor. The arbitrators found for the plaintiff and the award was confirmed by the court and judgment entered.

In the present action, the plaintiff sued to recover the promissory notes. The defendant alleged as a defense that the plaintiff and his witness had testified falsely before the arbitrators. The defendant also pleaded a counterclaim asking the court to set aside the award and the judgment entered thereon.

The plaintiff's motion to strike out this defense and the counterclaim as insufficient in law was denied by the Appellate Division. This decision was reversed by the Court of Appeals. *Jacobowitz* v. *Metselaar*.[1]

[1] 268 N. Y. 130, 197 N. E. 169, 99 A. L. R. 1198 (1935); 35 Col. L. R. 1305 (1935), 49 Harv. L. R. 327 (1935) and 20 Minn. L. R. 428 (1936).

The Appellate Division [2] ruled that the perjured testimony was fraud not only upon the defendant but also upon the arbitrators and the court. It said:

> . . . . The counterclaim, therefore, is clearly sufficient as seeking the vacating, in the interest of substantial justice, of a judgment secured by a fraud. Particularly is this so when, as here, it is contended by plaintiff that the award could not be vacated under Section 1457 C. P. A.

The Court of Appeals, however, held that perjury is " intrinsic " fraud and that the authorities are uniform in denying equitable relief against such fraud, including a judgment procured by perjury or false swearing at the trial. Quoting from Pomeroy [3] the court reiterated that public policy demands that there be an end to litigation and that if perjury were accepted as a ground for relief, litigation might be endless.

Such has been the weight of authority in this country ever since the Supreme Court handed down its decision in *U. S.* v. *Throckmorton.*[4] The reason usually given for the ruling in the Throckmorton case, in addition to the aforementioned public policy argument, seems to be that in case of " intrinsic fraud " the strict rules of evidence and cross-examination are sufficient guarantees to safeguard a fair trial on the merits and grant an opportunity to the losing party to refute the fraudulent evidence.

The principal issue before the Court of Appeals, therefore, was whether or not this rule of public policy should apply in case of a judgment entered upon an award. The Court, accepting this question as one of first impression in that state, held that since a judgment entered upon an award may be docketed and appealed from as if entered in an action, such a judgment is of the same force and effect as a judgment rendered in an action. The Court set forth its view in this connection as follows:

> Furthermore, our Act specifically states that the judgment entered upon an award is to be treated like a judgment in an action. The parties have notice of the motion to confirm and any of the objections specified in Section 1457 can be raised by the defeated party upon that notice; in fact, he can move himself to set aside the award for misconduct of party or arbitrator. We see no reason at this advanced stage of arbitration procedure for treating the judgment entered upon the award of the arbitrators in any different

[2] 243 App. Div. 274, (1st Dep't. 1935).

[3] Equity Jurisdiction, Vol. V, Sec. 2077.

[4] 98 U. S. 61 (1878).

way than judgments in actions are dealt with. Arbitration has been encouraged for the purpose of avoiding litigation and the costs and delay of trials at law or in equity. To permit a second trial upon the alleged ground of perjury would accomplish the reverse result and make arbitration more costly and the results subject to more delay. Our statutes have given to arbitration much of the formality of judicial proceedings and require at the hearings the same impartiality and fairness as those before referees or commissions.

We, therefore, are of the opinion that when equity will not set aside a judgment at law for intrinsic fraud, it should not do so when a judgment has been entered upon an award made in arbitration.

The moralities are, of course, against the litigant who seeks to take advantage of fraudulent evidence, whether at an arbitration or in the trial of an action in court. And by the prevailing view false swearing by a party before arbitrators is sufficient cause to defeat and vacate an award in his favor.[5] While the New York Courts have not determined the precise question, Section 1457 of the New York Civil Practice Act provides that an award shall be vacated for " corruption, fraud or undue means ", which seems clearly to proscribe a party's fraudulent false swearing. The Court of Appeals, moreover, indicates its approval of this conclusion in the principal case as follows: " The Civil Practice Act . . . . permits an award to be set aside when it has been procured by corruption, fraud or other undue means which would include the fraudulent or improper conduct of a party as well as misconduct of the arbitrators ".

The party so imposed upon in an arbitration has sufficient opportunity to discover the fraudulent misconduct of the other party in time to defeat the award, either by proceedings to vacate it or in proceedings to confirm it and enter judgment thereon. The ruling of the Court of Appeals therefore seems satisfactory. True, arbitration proceedings are not conducted with the same formality as a trial in court and strict rules of evidence generally are not followed; the parties may or may not be represented by counsel; the witnesses may or may not be sworn. It is highly improbable, however, that the absence of one or more of these matters of practice increases the probability of successful fraudulent swearing by a party in an arbitration over that in a trial in court. And rare, indeed, will be the case where a party will participate in an arbitration, whether in his own behalf or

[5] *French* v. *Raymond* 82 Vt. 156, 72 Atl. 324 (1909); *Black* v. *Harper*, 63 Ga. 752 (1879).

through counsel, who will be so insufficiently informed concerning the probabilities of the evidence relating to the matters in dispute that he will not become sensitive to possible fraudulent evidence of the adverse party in sufficient time to challenge the confirmation of the award. It is also likely that the training and special knowledge of the arbitrators with respect to the matters in controversy and their probabilities will be further assurance that only honest evidence will ultimately prevail and that substantial doubts as to any fraudulent evidence will be adequately voiced at the arbitral hearing immediately, to put any party in interest upon inquiry.—WALTER J. DERENBERG.

BOOK REVIEWS AND NOTES

The Law of Arbitration, by Quintin McGarel Hogg. London: Butterworth & Co., 1936. 344 pp.

The publication of a rounded, one might even say a dogmatic, treatise on the law of arbitration in England at this day reflects startlingly the relative rapidity and completeness with which the English law of the subject has escaped from the limitations which checked arbitration in approximately the same manner in both England and America about the middle of the last century. The key to the British progress is in two statutes: the common law procedure act of 1854 and the arbitration act of 1889. The results are embodied in the act of 1934.

These acts alone will hardly explain all of the differences between the arbitration system of the two parts of the English speaking world. A complete list of the differences would take us too far afield, but it is obvious that we should have to include the difficulty involved in the splitting of jurisdiction between state and federal courts and the diversity to be expected in 48 states. We should also have to include less tangible, or at least less ponderable, effects, such as the attitudes of courts and of business men to arbitration, which in turn are to be explained by proximity to or distance from Continental models, and differences in business methods and in the sizes and degrees of diversity of groups engaging in particular businesses. In all of these respects the English arbitrator has had an advantage.

On the other hand, English arbitration has developed sharp, dogmatic lines, dictated by statute and by rules of court, that make it far less susceptible to general applications in new fields or to experimentation than is the common law arbitration that still predominates in spite of the recent statutory developments here in most American states. Thus, Mr. Hogg is able to say that there are three possible sources, and only three, from which an arbitration may derive its binding character: (1) a submission; (2) an order of the court; (3) provisions of an act of Parliament. Logically it may be possible so to define these three sources as to include the rules and regulations of an association such as a stock exchange, clauses in contracts pertaining to disputes which

may arise but have not yet arisen, or any other source known to the law. Mr. Hogg is, however, able categorically to divide his book into three parts on the basis of his tripartite arrangement of sources. Inasmuch as there is a great diversity between the practice of the various courts that he lists and our own, and even greater diversity, or rather no correspondence at all, between the statutory references around which the third part of his book is built and our own, the part of the work most interesting to American readers is that which deals with references arising from a submission.

Particularly interesting and instructive are the chapters dealing with the construction and effect of submissions. It seems that certain expressions commonly used here to give the arbitrators as wide a scope as possible are popular in England, too—such as the submission of " all matters in difference between the parties ", or, after stating a dispute specifically, " and all other differences ". The cases reach approximately the same result as those in this country: that of getting at the intent of the parties rather than giving these broad terms their literal meaning. The expression " in the usual manner " has led to difficulties. It does not mean " under the arbitration acts " but, rather, points to a contrary intention.

The conduct of the arbitrator and the substantial requisites of an award (jurisdiction, completeness, finality, certainty, and consistency) do not differ from those with which we are familiar in this country, excepting perhaps that they have been more sharply defined and standardized. The formal requisites are purely statutory. One chapter that should be thoughtfully read by every American interested in arbitration is that dealing with the enforcement of a foreign award. American awards may be enforced only at common law, very much as if they were contracts. The statutory aid given to " foreign awards " applies only to those made by subjects of countries that are parties to the Convention of the 26 of September, 1927, within certain listed territories. Up to the date of publication, 18 countries have been declared to be such parties, and 29 territories have been included. The United States of America is not in the list.

NATHAN ISAACS,
Harvard Graduate School of
Business Administration.

The Law of Arbitration in Scotland. By D. A. Guild. Edinburgh: W. Green & Son, Ltd., 1936.

As the author states in his preface, this work is a presentation "in a connected and reasonably concise form" of the law of arbitration as it is today in Scotland, rather than "a treatise with elaborate expositions of the cases and exhaustive considerations of debatable questions". The result is that its 118 pages of text offer in concentrated form all of the important law governing arbitrations in Scotland, including discussions of statutory arbitrations, judicial references, valuations, and foreign submissions and awards. Its summary of the law is liberally annotated with the citation of nearly 400 cases ranging in date from the year prior to the discovery of America to the present time.

As the author has pointed out, the law of arbitration is almost wholly the law of contracts. We, in America, lean so heavily on the Common Law for our contract law that we must inevitably look to the parent law for our law of arbitration, especially in view of the comparatively few years during which arbitration has been in active use here. Thus we find that the basic principles discussed by Mr. Guild are in accord with the law of arbitration as we practice it in this country. It is but natural that in our short experience there should be many points on which our courts have not been called upon to speak, whereas in older jurisdictions, such as Scotland, many of the smallest details have had judicial consideration. This book, therefore, affords a workable summary of arbitration law as we understand it, together with a full discussion of the finer points which have not yet been considered in our reports.

Arbitration students and practitioners will find great encouragement in this work, as it demonstrates so clearly that, in a jurisdiction in which arbitration has been recognized for centuries as an important part of the machinery for the administration of justice, arbitration has retained its vitality and has not lost its basic characteristics of speed, economy, informality, and above all finality, to which it owes so much of its usefulness and popularity. During this long span of years the courts of Scotland have not found it necessary or advisable "to put this upstart in its place" and to shackle it with legalistic formalities to which the courts have been so long accustomed. The history of arbi-

tration in Scotland and England demonstrates beyond question that arbitration is an accomplished fact and is destined to acquire here in America ever increasing importance in the settlement of our commercial disputes.

The language used by Mr. Guild and the legal proceedings to which he refers may at times be unfamiliar to us, but this little book contains such a thoughtful review of the foundation of our own law of arbitration that it deserves a place in the library of American attorneys interested in this subject.

S. WHITNEY LANDON.

Arbitration Brochures. "Commercial Arbitration under British Law (England and Wales, Scotland and Northern Ireland)" by J. E. James, Secretary, Imperial Chemical Industries, Ltd., is the latest of a series of booklets issued by the International Chamber of Commerce (Brochure No. 91), in which commercial arbitration and the laws relative thereto are dealt with country by country. Similar Brochures previously issued deal with commercial arbitration under Swiss Law (No. 61), Italian Law (No. 62), Dutch Law (No. 63), French Law (No. 65), German Law (No. 72) and Belgian Law (No. 88).

Additional pamphlets on other countries are in preparation and, when completed, the series will form a Handbook on Commercial Arbitration. Copies of the above Brochures may be obtained from the International Chamber of Commerce or the American Arbitration Association.

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General

AMERICAN DYESTUFF REPORTER, February 24, 1936, *Arbitration Association;* AMERICAN WOOL & COTTON REPORTER, January 2, 1936, *Arbitration Features;* BOXOFFICE, April 4, 1936, *The Legal Angle in Showmanship-Arbitration* (p. 28), Solomon R. Kunkis; BULLETIN OF THE UNIVERSITY OF MISSOURI SCHOOL OF MINES & METALLURGY. TECHNICAL SERIES, V. 11, No. 1, 1936, *Public Arbitration in Athenian Law* (pp. 1-42), H. C. Harrell; CHRISTIAN SCIENCE MONITOR (Weekly Magazine Section), December 2, 1936, *Settled Out of Court* (p. 8), Marjorie Schuler;

EASTERN UNDERWRITER, February 7, 1936, *Tenth Anniversary of Arbitration Movement;* EDITOR & PUBISHER, February 1, 1936, *Nineteen Agents on Panel; Advertising Men Named by American Arbitration Association;* EQUITY, June 1936, *The Record of the Year's Arbitrations,* Rebecca Brownstein; EXPORT TRADE & SHIPPER, June 1, 1936, *Settling Disputes By Proxy* (Editorial), (p. 8) ; August 3, 1936, *Endorses Work of Arbitration Committee* (p. 14) ; November 16, 1936, *Settling Foreign Trade Disputes By Arbitration* (pp. 12, 15, 16), James S. Carson; INSURANCE ADVOCATE, January 25, 1936, *Arbitration Anniversary;* May 16, 1936, *Concerning Arbitration of Insurance Claims,* Max Levy; JOURNAL OF AMERICAN INSURANCE, October 1936, *Arbitration Or Law Suits* (pp. 17-19), Louis H. Pink; MONTHLY BULLETIN OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, November 1936, *The Chamber's Arbitration System* (p. 227) ; NATIONAL LAUNDRY JOURNAL, October 1936, *What Is Your Driver's Contract Worth?,* (pp. 388-9), Louis L. Garrell; November 1936, *Watch Clauses* (p. 498), Louis L. Garrell; NEW REPUBLIC, July 8, 1936, *By-Passing The Courts,* Felix Warburg; NEW COMMERCE & FINANCE & INVESTORS, November 28, 1936, *Arbitration Prevents Commercial Log Jams—Inter-American Commercial Arbitration Commission Settles Trade Disputes* (pp. 855, 873-4), Herman G. Brock; NATION'S BUSINESS, July 1936, *When Business Men Disagree* (pp. 29-30, 76-7), Lucius R. Eastman; RAYON & MELLIAND TEXTILE MONTHLY, April-May 1936, *Arbitration in The Textile Industry* (pp. 211, 319), H. R. Mauersberger; READER'S DIGEST, August 1936, *Why Not Arbitrate?* (p. 21), Felix M. Warburg; SALES MANAGEMENT, April 1, 1936, *Tentative Model Agreement For Self Government of ABC Industry;* TEXTILE WORLD, March 1936, *Arbitration's Birthday;* THINK, March 1936, *Trade Arbitration and World Peace* (pp. 5, 18), James S. Carson; June 1936, *Place of Arbitration In The Modern World* (pp. 11, 21), Lord Askwith.—FRANCES L. VAN SCHAICK.

OUTSTANDING ADDRESSES IN 1936

(IN THE UNITED STATES)

WILLIAM L. RANSOM, former President, American Bar Association; GEORGE S. VAN SCHAICK, former Superintendent of Insurance, State of New York; PELHAM ST. GEORGE BISSELL, President Justice, Municipal Court of the City of New York, at the Decennial Dinner of the American Arbitration Association, February 4, in New York City.

CHARLES L. BERNHEIMER, Chairman, Arbitration Committee of the Chamber of Commerce of the State of New York, at a joint meeting of the Chamber and the American Arbitration Association, February 20, in New York City.

LOUIS K. COMSTOCK, President of the Merchants Association of New York and STEPHEN F. VOORHEES, President of the American Institute of Architects, at a joint meeting of the Merchants Association, the New York Building Congress and the American Arbitration Association, March 19, in New York City.

JOHN G. WINANT, Chairman, Social Security Board, at a joint meeting of the National Retail Dry Goods Association, Dry Goods Association of New York and the American Arbitration Association, April 14, in New York City.

MOSES H. GROSSMAN, Chairman, Arbitration Committee of the New York County Lawyers' Association, at a meeting of the New York State Society of Certified Public Accountants, May 11, in New York City.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, at the annual convention of the International Claim Association, September 14, in Ottawa, Canada.

L. F. SCHAEFFER of Thomas H. Wolstenholm (Philadelphia); G. F. GEIS of Buckley & Cohen, Inc. (New York) and J. NOBLE BRADEN, Executive Secretary of the American Arbitration Association, at a meeting of the Yarn Sellers Division of the National Association of Wool Manufacturers, November 18, in New York City.

J. NOBLE BRADEN, at the American Finance Conference, November 19, in Chicago.

JAMES S. CARSON and J. NOBLE BRADEN, at the Latin-American Session of the Twenty-third National Foreign Trade Convention, November 20, in Chicago.

THOMAS J. WATSON, President, International Business Machines Corporation, at a luncheon in his honor at the Bankers Club, December 3, in New York City.

JAMES S. CARSON, at a meeting of the Rotary Club of Greenwich, December 9, at Greenwich, Connecticut.